Supreme Court, U.S.
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In the

Supreme Court of the United States

INDU CRAFT, INC.,

Petitioner,

v.

BANK OF INDIA, TRENDI SPORTSWEAR, INC.,
The BANK OF BARODA,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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168

QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 524 (e) prohibits the discharge of a debtor's obligation to pay a debt for which a third party is or may be liable from relieving the third party of its liability for the debt.

2. Whether the Bankruptcy Court may allow the debtor to pursue a derivative claim post-confirmation against a third party for the benefit of the debtor's creditors as part of a plan of confirmation without payment of the underlying judgment.

3. Whether a plan of confirmation may be collaterally attacked in the district court by a party in interest in the debtor's bankruptcy proceedings.

4. Whether a post-confirmation federal bankruptcy judgment is enforceable against the debtor and may be used by the debtor as the basis for an indemnification claim against a third party.

PARTIES TO THE PROCEEDING

Petitioner: Indu Craft, Inc. ("Indu Craft"), is a non-governmental corporate party to the proceedings before the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit.

Indu Craft discloses herein that it is a New York company, that there are no parent corporations to Indu Craft, and that there are no publicly held companies which own 10 percent more of Indu Craft's stock.

Petitioner: Trendi Sportswear, Inc. is also a non-governmental corporate party to the proceedings before the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit.

Respondent: Bank of Baroda is a banking institution owned and controlled by the Government of India with branches in the United States.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 27

APPENDIX

Circuit Court Opinion 1a

District Court Opinion 7a

District Court Opinion 18a

Bank of Baroda Limited Objection 37a

Verdict Sheet 39a

Excerpts from Indu Craft's Petition 41a

Bankruptcy Court Judgment 45a

Excerpts from Indu Craft's Petition 46a

District Court Judgment 50a

Second Amended Plan of Reorganization 52a

Modifications to Second Amended Plan 85a

Order Confirming Plan of Reorganization 90a

Stipulation Governing Treatment of Claim 102a

Bank of Baroda Limited Objection 105a

Notice of Hearing 107a

Affidavit of Service 110a

Bank of Baroda Objection 111a

Notice of Appeal of Trendi Sportwear, Inc. 117a

Bank of Baroda Motion 119a

Affidavit of Constance M. Boland 122a

Declaration of Constance M. Boland 124a

Baroda Reply Memorandum 126a

District Court Order 129a

Statutory Provisions Involved 131a

TABLE OF AUTHORITIES

Cases

ADAIR V. SHERMAN, 230 F.2D 890, 894 (7TH CIR. 2000) 23

BANK OF INDIA V. TRENDI SPORTSWEAR, INC., 239 F.3D 428 (2ND CIR. 2000) 2, 5

BUTNER V. UNITED STATES, 440 U.S. 48, 55, 59 L.ED.2D 136, 99 S.CT. 914 (1979) 15

CELOTEX CORPORATION V. EDWARDS, 514 U.S. 300, 313, 131 L.ED.2D 403, 115 S.CT. 1493 (1995) 24, 25

GREEN V. WELSH, 956 F.2D 30, 33 (2D CIR. 1992) 11

HINES V. DAVIDOWITZ, 312 U.S. 52, 67 (1941) 17

HOSEMAN V. WEINSCHNEIDER, 322 F.3D 468, 475 (7TH CIR. 2003) 14

IN RE CONTINENTAL AIRLINES, 203 F.3D 203, 214 (3D CIR. 2000) 19

IN RE DREXEL BURNHAM LAMBERT GROUP, INC., 960 F.2D 285, 293 (2D CIR. 1992) 19

IN RE DUVOISIN, 59 B.R. 638, 642 (BANKR. E.D. TENN. 1986) 13

IN RE LOWENSCHUSS, 67 F.3D 1394, 1402 (9TH CIR. 1995), ("SECTION 524 (E) PRECLUDES DISCHARGING THE LIABILITIES OF NONDEBTORS"), CERT. DENIED, 517 U.S. 1243 (1996) 19, 23

IN RE MOMENTUM MFG. CORP., 25 F.3D 1132, 1136 (2D CIR. 1994) 13

IN RE MUNFORD, INC., 97 F.3D 449, 455 (11TH CIR. 1996) 19

IN RE PRUDENTIAL LINES, INC., 928 F.2D 565, 571 (2D CIR.), CERT. DENIED, 502 U.S. 821 (1991) 11

IN RE SHONDEL, 950 F.2D 1301, 1308 (7TH CIR. 1991) 24

IN RE SPECIALTY EQUIPMENT CO., 3 F.3D 1043, 1049 (7TH CIR. 1993) 19

IN RE WESTERN REAL ESTATE FUND, INC., 922 F.2D 592, 601 (10TH CIR. 1990)(VACATING PERMANENT INJUNCTION OF CLAIMS AGAINST NONDEBTORS), MODIFIED BY ABEL V. WEST, 932 F.2D 898 (10TH CIR. 1991) 19

IN RE ZALE, CORP., 62 F.3D 746, 760 (5TH CIR. 1995) 19

INDU CRAFT V. BANK OF BARODA, 47 F.3D 490 (2D CIR. 1995) 2, 4, 11

INDU CRAFT V. BANK OF BARODA, 87 F.3D 614 (2D CIR 1996) 2, 4

KANE V. JOHNS-MANVILLE CORP., 843 F.2D 636, 640, 649 (2D CIR. 1988) 19

MENARD-SANFORD V. MABEY, 880 F.2D 694, 702 (4TH CIR 1989), CERT. DENIED, 493 U.S. 959 (1989) 19

PACIFIC GAS & ELECTRIC CO. V. STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, 461 U.S. 190, 204, 75 L.ED.2D 752, 765, 103 S.CT. 1713, 1722 (1983) 17

PINTO V. ALLSTATE INSURANCE CO., 221 F.3D 394, 404 (2D CIR. 2000) 14

RONNEN V. AJAX ELEC. MOTOR CORP, 88 N.Y.2D 582, 589, 648 N.Y.S.2D 422, 425, 671 N.E.2D 534, 537 (1996) 22

SEGAL V. ROCHELLE, 382 U.S. 375, 379, 86 S.CT. 511, 515, 15 L.ED.2D 428, 432 (1966) 11

STOLL V. GOTTLIEB, 305 U.S. 165, 171-172, 59 S.CT. 134, 137-138, 83 L.ED. 104, 108-109 (1938) 23, 26

UNDERHILL V. ROYAL, 769 F.2D 1426, 1432 (9TH CIR. 1985) 18

UNION CARBIDE CORP. V. NEWBOLES, 686 F.2D 593, 595 (7TH CIR. 1982)(PER CURIAM) 20

Statutes

11 U.S.C. § 524 ..... 1, 5, 7

11 U.S.C. § 1123 ..... 9, 17

11 U.S. C. § 1129 ..... 9, 23

11 U.S. C. § 1129(a) 23

11 U.S.C. § 1129(a)(10) 21

28 U.S.C. § 1254 1

New York Ins. Law § 3420
(McKinney's West 2000) 14

OPINIONS BELOW

The Court of Appeals Opinion is reported at Bank of India v. Trendi Sportswear, Inc., 64 Fed. Appx. 827, 2003 U.S. App. LEXIS (2nd Cir. May 15, 2003), and is reproduced in the Appendix at App. 1. The Court of Appeals affirmed the District Court's decision "largely" for the reasons set forth in the District Court's decision. App. 6. The District Court issued a written opinion which is reported at Bank of India v. Trendi Sportswear, Inc., 89 Civ. 5996 (JSM), 2002 U.S. Dist. LEXIS 894 (S.D.N.Y. January 17, 2002), which is reproduced in the Appendix at App. 18. The District Court also issued a written opinion denying the motion of the third party plaintiff, Trendi Sportswear, Inc. ("Trendi"), to file a second third party complaint against Baroda, which is reported at Bank of India v. Trendi Sportswear, Inc., 89 Civ. 5996 (JSM), 2002 U.S. Dist. LEXIS 14801 (S.D.N.Y. August 7, 2002), and is reproduced in the Appendix at App. 7.

JURISDICTION

The Court of Appeals entered its decision on May 15, 2003. Subsequently, Indu Craft moved for rehearing of the Court of Appeals decision. Rehearing was denied on June 7, 2003. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry of the Court of Appeals decision denying rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS

11 U.S.C. § 524 (a)(1), (e)

(a) A discharge in a case under this title–

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

STATEMENT

The decision of the Court of Appeals charts a 16 year odyssey in which Indu Craft has been seeking to hold the respondent, Bank of Baroda ("Baroda"), accountable for its malicious actions leading to the destruction of its business when Indu Craft refused to pay the bank's general manager of its New York branch a bribe in order to maintain its credit facilities. The factual events charting Indu Craft's struggle to hold Baroda accountable for its malicious conduct are recounted in Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2nd Cir. 2000); Indu Craft v. Bank of Baroda, 87 F.3d 614 (2d Cir 1996); Indu Craft v. Bank of Baroda, 47 F.3d 490 (2d Cir. 1995); and related district court decisions cited therein.

The dispute between Indu Craft and Baroda was initially brought in the United States District Court for the Southern District of New York in 1987 in an action entitled Indu Craft v. Bank of Baroda under Index No. 87 Civ. 7379 (the "1987 Action"). In the 1987 Action, Indu Craft asserted claims against Baroda, inter alia, for

breach of contract and prima facie tort after Baroda reduced and/or extinguished its credit facilities resulting in the destruction of its business. In 1990, the Bank of India ("BOI"), a sister company to Baroda and also owned by the government of India, commenced this action in the United States District Court for the Southern District of New York against Trendi for its failure to repay BOI monies Trendi borrowed in order to directly import goods it contracted with Indu Craft to purchase but which Indu Craft could not supply to Trendi due to Baroda's tortious acts.

After Trendi was sued by BOI, it brought a third party action against Indu Craft alleging that Indu Craft was liable for Trendi's inability to repay BOI, for lost profits and for damages compensating Trendi for the destruction of its business resulting from its failure to supply its customers with contracted garments. Indu Craft, in turn, commenced a fourth party action against Baroda alleging that Baroda was liable for any damages suffered by Trendi as the result of Indu Craft's inability to supply Trendi with the contracted garments ("Trendi Damages").

Baroda moved to dismiss the fourth party complaint claiming the fourth party action was an improper impleader complaint or, alternatively, to stay the BOI Action pending the outcome of the 1987 Action. Indu Craft cross-moved to have its fourth party action consolidated with the 1987 action because both actions stemmed from the same tortious actions taken by Baroda in destroying Indu Craft's business and it made no sense for the actions to be tried separately. The District Court did not reach Baroda's impleader motion and instead denied Indu Craft's consolidation motion and stayed the third and fourth party actions reasoning that the outcome of the 1987 Action would have

preclusive effect. If Indu Craft lost at trial in the 1987 Action, clearly its fourth party action against Baroda would not survive. At the same time, Indu Craft believed that if it won at trial, a verdict against Baroda would bar Baroda from relitigating the same underlying liability issues in the BOI Action. After Indu Craft's consolidation motion was denied in the BOI Action, Indu Craft moved in the 1987 Action to join Trendi as a party, but that motion was also denied.

The 1987 Action was tried to a jury in a month long trial in August 1992. Baroda was found liable to Indu Craft for breach of contract and prima facie tort and Indu Craft was awarded damages for the destruction of its business. App. 39-41. After the verdict in Indu Craft's favor, the 1987 Action took two successive trips to the Second Circuit, which affirmed based upon ample evidence, but modified the damage award. See Indu Craft v. Bank of Baroda, 87 F.3d 614 (2d Cir 1996); Indu Craft v. Bank of Baroda, 47 F.3d 490 (2d Cir. 1995).

When judgment was finally entered against Baroda in 1996, four years after the jury rendered its verdict, Baroda did not pay the judgment, but instead commenced a contrived interpleader action in the Southern District of New York and deposited the judgment amount with the court. The failure to pay the judgment to Indu Craft caused Indu Craft to file a Chapter 11 petition for bankruptcy relief. After its bankruptcy petition was filed, at Indu Craft's request, in 1997 the District Court lifted its stay of the BOI action so that Indu Craft could continue its fourth party action against Baroda for Trendi Damages. Up to then, Indu Craft had been precluded from recovering Trendi Damages in both the 1987 Action and the BOI Action. Baroda immediately moved for summary judgment on

the grounds of res judicata arguing that Indu Craft should have sought Trendi Damages in the 1987 Action. The District Court agreed and dismissed Indu Craft's fourth party complaint. The Second Circuit reversed the District Court after concluding that Indu Craft was blocked by Baroda from litigating its claim for Trendi Damages in the 1987 Action. The Second Circuit held that the essential element of the application of res judicata–that Indu Craft had a full and fair opportunity to seek Trendi Damages in the 1987 Action–was lacking. See Bank of India v. Trendi Sportswear, 239 F.3d at 439.

After its fourth party complaint was reinstated, Indu Craft amended its complaint as of right (Baroda never answered the fourth party complaint even though the District Court permitted it to make a summary judgment motion) in order to incorporate the critical events of the prior decade including the jury verdict rendered against Baroda in the 1987 Action and an unconditional money judgment in the amount of $21,101,348.47 rendered against Indu Craft post-confirmation in favor of Trendi in Indu Craft's bankruptcy proceeding (the "bankruptcy judgment") after proceedings by the bankruptcy court fixed the amount of Trendi's pre-petition claim. App. 45.

Baroda immediately moved to dismiss the amended fourth party complaint under Rule 12 (b)(6), Fed. R. Civ P., asserting that Trendi's claim for damages against Indu Craft was discharged by confirmation of Indu Craft's Plan of Confirmation (the "Plan") and, therefore, the bankruptcy judgment was null and void under 11 U.S.C. § 524 (a) of the Bankruptcy Code.

In a decision entered on January 17, 2002, the District Court granted Baroda's motion concluding that "since Indu Craft has been discharged from its

obligation to pay Trendi the judgment entered against it in the bankruptcy proceeding, and Trendi is barred from seeking to enforce that judgment against Indu Craft, Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed." App. 25. Despite the absence of any language in the Plan, or in the unconditional money judgment entered against Indu Craft by the Bankruptcy Court, the District Court concluded that Trendi agreed to limit its enforcement of the bankruptcy judgment to whatever Indu Craft recovered against Baroda in the fourth party action. App. 14. In a decision entered on August 7, 2002, the District Court also denied Trendi's motion to vacate the final judgment entered in the BOI Action after dismissing Indu Craft's amended fourth party complaint because the court's decision did not deal with Trendi's pending second third party complaint naming Baroda directly as a third party defendant. App. 7. In its decision, the District Court clarified that "the Court never questioned the validity of the Bankruptcy Court's judgment. It merely held that Indu Craft's indemnification claim against Baroda failed to state a cause of action as a matter of New York law, and that therefore Trendi's agreement to limit its recovery on the judgment against Indu Craft to the proceeds, if any, of the prosecution of that claim by Indu Craft, would preclude Trendi from collecting on its judgment." App. 14. The District Court concluded that the judgment entered against Indu Craft was not a void judgment and therefore the validity of the judgment was "fatal" to Trendi's attempt to file a timely second third party complaint under Rule 15, Fed. R. Civ. P., that would relate back to the filing of Trendi's original third party complaint in 1990. App. 14.

On May 15, 2003, the Second Circuit affirmed both decisions "largely" for the reasons set forth in the

District Court's opinions. App. 6. The Second Circuit commented in its opinion that the course of this litigation was "long and convoluted." App. 5. It is ironic that Indu Craft vehemently sought to have its claim for Trendi Damages tried in the 1987 Action but was unsuccessful due to the vigorous efforts of Baroda and was stayed from recovering these damages in the BOI Action until 1997. Once Indu Craft was able to finally pursue its claim for Trendi Damages in the BOI Action, its claim was dismissed by the District Court which wrongly and inconceivably determined that Indu Craft should have sought Trendi Damages in the 1987 Action. It was not until the year 2000, after securing a reversal of the District Court's dismissal of its complaint on res judicata grounds, that Indu Craft was able to continue its action against Baroda, an entire decade after the action was commenced though no fault of its own. When it filed its amended complaint, it was immediately met with another dismissal motion by Baroda. The District Court once again found Indu Craft to be barred from seeking Trendi Damages, this time because Indu Craft confirmed a plan of reorganization–one that was made necessary by Baroda's continued malicious conduct toward Indu Craft in failing to pay Indu Craft the judgment amount even after it was adjudicated as having caused the destruction of its business.

REASONS FOR GRANTING THE WRIT

The Court should grant Indu Craft's Petition for a Writ of Certiorari because the opinions of the courts below precluding Indu Craft from prosecuting its derivative claim against Baroda for the amount of the bankruptcy judgment under Rule 14, Fed. R. Civ. P. (1), violate the fundamental tenet of 11 U.S.C. § 524 (e), which provides that "...discharge of the debt of the debtor does not affect the liability of any other entity, or

the property of any other entity for, such debt," (2) expressly hold that the act of confirmation of Indu Craft's Plan eradicated its derivative claim against Baroda and consequently negated the allowed claims of Indu Craft's Class 5 impaired creditors–a legal impossibility under established bankruptcy law which requires every confirmed plan to be feasible, not violative of law, propounded in good faith and provide for adequate means of implementation- and (3) render unenforceable an unconditional federal bankruptcy money judgment from which no appeal has been filed.

Section 524 (e) makes clear that the insolvency of the debtor, i.e. its inability to pay, may not be used by an indemnitor of the debtor as a sword to defeat claims by third parties against the debtor for which the indemnitor is or may be liable to the debtor. The Court of Appeals and the District Court effectively wrote section 524 (e) out of the Bankruptcy Code by making Baroda the beneficiary of Indu Craft's insolvency. The decisions of the courts below effectively grant a non-debtor discharge to Baroda under section 524 (e) by insulating it from suit on an indemnification claim by the debtor as the direct beneficiary of Indu Craft's own discharge. The circuit courts are in conflict as to whether a non-debtor can be released from liability by the discharge of the debtor under section 524 (e). The granting of this Petition for Certiorari will resolve the conflict in the circuit courts regarding the interpretation of section 524 (e) and the extent to which a non-debtor may benefit from the debtor's discharge and will also decide an issue of fundamental importance in this age of what seems to be unending corporate malfeasance, which is the extent to which non-debtors may be held derivatively liable post-discharge for injuries for which they may be liable to an insolvent corporate debtor.

Secondly, Indu Craft's Petition for Certiorari should be granted because the courts below, which are not the courts of the first instance, were without jurisdiction to grant relief to Baroda, which was a party in interest in Indu Craft's bankruptcy proceedings, the essence of which overturned and unraveled the Plan outside of the bankruptcy appellate process with its attendant procedural and due process safeguards. The decisions below also wrongly conclude, as stated above, that the very act of confirmation resulted in the loss of Indu Craft's derivative claim against Baroda, the proceeds of which were assigned to pay the claims of Indu Craft's class 5 creditors. As a matter of federal bankruptcy law, it is a legal impossibility for the act of confirmation to negate the allowed claims of Indu Craft's class 5 creditors under its Plan because such a result would be contrary to law and render a plan of confirmation unconfirmable for lack of feasibility under 11 U.S. C. § 1129 (a)(11), for lack of good faith under 11 U.S.C. § 1129 (a)(3) and for failure to provide adequate means of implementation under 11 U.S.C. § 1123 (a)(5) (i.e. lack of adequate means to pay Indu Craft's Class 5 creditors). Baroda's motion in the District Court represents an impermissible collateral attack on Indu Craft's unappealed Plan and an attack on the specific factual findings made by the bankruptcy judge..

Thirdly, Indu Craft's Petition for Certiorari should be granted because the opinions below are so fundamentally inconsistent as to call for the Court to exercise its supervisory powers in order to revive and give effect to an unconditional federal bankruptcy money judgment. The courts below did not find the bankruptcy judgment to be a void judgment. Indeed, the Plan expressly authorized the entry of an unconditional money judgment against Indu Craft post-confirmation which was to permit Indu Craft to prosecute its

derivative claim against Baroda under Rule 14, Fed. R. Civ. P. If the bankruptcy judgment is not a void judgment, then it is imbued with all of the enforcement rights under Rule 69, Fed. R. Civ. P., that is attendant to every federal money judgment. As such, it is fully enforceable against Indu Craft and Indu Craft has the unfettered right under Rule 14, Fed. R. Civ. P., to hold Baroda derivatively liable for the amount of the bankruptcy judgment.

In summary, this case presents the question whether a derivative claim may be prosecuted by a debtor without payment of the derivative judgment where a Plan of Confirmation so provides. If not, then Indu Craft's Plan of Confirmation is a nullity. If Indu Craft's Plan of Confirmation is a nullity, then Baroda should not benefit from any discharge defense arising from confirmation of the Plan. In either case, Indu Craft should have been permitted to pursue its fourth party action against Baroda.

POINT I

RELIEVING BARODA FROM LIABILITY FOR ITS TORTIOUS CONDUCT IN DESTROYING INDU CRAFT'S BUSINESS AS THE BENEFICIARY OF INDU CRAFT'S DISCHARGE IS IN DIRECT CONFLICT WITH THE CLEAR PROHIBITION OF SECTION 524 (e)

There is no dispute as to the relevant facts. Baroda caused the destruction of Indu Craft's business when Indu Craft refused to pay a bribe to Baroda's New York branch manager. After a one month jury trial, Baroda was adjudicated as having engaged in "deliberate delay in issuing letters of credit" and "intentionally acted with malice" to drive Indu Craft out

of business. Indu Craft, Inc. v. Bank of Baroda, 47 F.3d at 496-97; App. 39-42. The destruction of Indu Craft's business prevented Indu Craft from fulfilling its contract with Trendi for the supply of goods and Trendi's business was destroyed as a direct consequence of Baroda's actions. When Trendi sued Indu Craft in the BOI action, after having been sued by Baroda's sister bank, Bank of India, Indu Craft sued Baroda in a fourth party action pursuant to Rule 14, Fed. R. Civ. P., asserting as the victim of Baroda's tortious conduct that if Indu Craft is liable to Trendi, Baroda is liable to Indu Craft.

A. Section 524 (e) Precludes Baroda's Derivative Liability from Being Affected by Indu Craft's Discharge and Inability to Pay the Bankruptcy Judgment

In passing section 524 (e), Congress intended "to free the debtor of his personal obligations while ensuring that no one else reaps a similar benefit." Green v. Welsh, 956 F.2d 30, 33 (2d Cir. 1992)(cases cited). A derivative claim of a debtor is part of the debtor's property and a potential asset of its estate from which creditors claims can be satisfied. A debtor which has a derivative claim against a party does not lose the claim simply by filing a bankruptcy petition. Such a rule would be contrary to the overriding purpose of the bankruptcy laws which are to preserve assets of the debtor for distribution to its creditors. See Segal v. Rochelle, 382 U.S. 375, 379, 86 S.Ct. 511, 515, 15 L.Ed.2d 428, 432 (1966)("The main thrust of [the bankruptcy laws] is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition"); In re Prudential Lines, Inc., 928 F.2d 565, 571 (2d Cir.), cert. denied, 502 U.S. 821 (1991)(same). The derivative claim thus, if anything, is

preserved by the bankruptcy filing as a potential asset of the debtor's estate.

The question in this case answered in the negative by the courts below is whether it is permissible for the Bankruptcy Court to allow the debtor to pursue the derivative claim post-confirmation against a third party for the benefit of the debtor's creditors as part of a plan of confirmation. The obvious answer to this question must be yes. That is exactly what the Bankruptcy Court did in this case in the words and substance of Indu Craft's Plan. It permitted and provided the funding mechanism in section 7.1(b) of Indu Craft's Plan for Indu Craft to pursue its derivative claim against Baroda for the benefit of its creditors based upon the amount that Indu Craft was found liable to Trendi. App. 42, 88. It also permitted in section 5.2 of the Plan for Indu Craft to assign the proceeds of any recovery it obtained from Baroda to its class 5 creditors in payment of their allowed claims. App. 42, 88. Finally, in section 5.2 of the Plan, it permitted judgment to be entered against Indu Craft post-confirmation in the amount of Trendi's claim as determined by the Bankruptcy Court nine months after the alleged discharge of Indu Craft of Trendi's claim.

The District Court concluded that because New York State indemnity law required payment of the bankruptcy judgment as a condition to pursuing the derivative claim and, because the Trendi claim underlying the bankruptcy judgment had been discharged by the Plan, Indu Craft could never satisfy the condition of payment. App. 14, 25-27. Firstly, the courts below erred because it is hornbook law that "[t]o the extent that the plan or order of confirmation provides for the payment of a claim, such claim is not discharged." See 8 Collier on Bankruptcy, ¶ 1141.01at

1141-3 (15th Rev. ed. 2003). There is no question that the Plan provided for the payment of Trendi's allowed claim.

There is also no question that instead of allowing Indu Craft to pursue its derivative claim against Baroda post-confirmation (as permitted under §1123, see In re DuVoisin, 59 B.R. 638, 642 (Bankr. E.D. Tenn. 1986)), the Bankruptcy Court could have permitted Indu Craft to continue its derivative claim pre-confirmation by prosecuting the fourth party action and confirm a plan only if the prosecution was successful and monies recovered from Baroda. See also Bankruptcy Code § 105 (a); In re Momentum Mfg. Corp., 25 F.3d 1132, 1136 (2d Cir. 1994)(A bankruptcy judge in administrating the estate of the debtor "'may sift the circumstances surrounding any claim . . . and in so doing may adopt that remedy which it deems most appropriate under the circumstances'"). In such a case, there would be no issue of discharge and Indu Craft's amended fourth party complaint would not be subject to dismissal based on the analysis of the decisions of the courts below. If Indu Craft was entitled to pursue its derivative claim against Baroda pre-confirmation, it must have that right post-confirmation if so provided in a plan of confirmation. And there is no question that Indu Craft's Plan preserved and provided for the continued prosecution of Indu Craft's derivative claim against Baroda, as even the District Court acknowledged. App. 22 ("Thus, the Plan clearly contemplated that Indu Craft would pursue the fourth party indemnification claim against Baroda"). Preventing Indu Craft from prosecuting its derivative claim against Baroda post-confirmation leads to an incongruous result and interferes with the much stated twin aims of every reorganization effort including (1) obtaining a fresh start for the debtor with a quick exit from the bankruptcy

proceedings and (2) marshaling all of the assets of the debtor wherever they may be found to maximize the return of the debtor's unsecured creditors. See Hoseman v. Weinschneider, 322 F.3d 468, 475 (7th Cir. 2003)(citing Iannacone v. Foothill Capital Corp., 95 B.R. 982, 1003 (Bankr. D. Minn. 1989)).

Notwithstanding that Indu Craft should have been permitted to prosecute its derivative claim against Baroda as set forth in its Plan and despite Indu Craft's discharge, section 524 (e) bars a derivatively liable defendant from being relieved of liability as the result of the debtor's discharge or, in other words, its inability to pay. A similar rule has been enacted in many jurisdictions preventing insurance companies from raising the insolvency of an insured as a defense to coverage. See, e.g., New York Ins. Law § 3420 (McKinney's West 2000). The insured's insolvency has even been removed as a defense to the assignment and enforcement of an insured's bad faith claim against its insurer. See Pinto v. Allstate Insurance Co., 221 F.3d 394, 404 (2d Cir. 2000)("To allow an insurer to escape bad faith liability because its insured lacks the ability to pay an excess judgment would introduce a perverse and undesirable incentive into personal liability actions, discouraging rather than encouraging settlement. Such a rule would allow an insurer who has acted in bad faith to reap a windfall...."). The result of the enactment of section 524 (e) is the preservation of the debtor's derivative claim, despite the debtor's inability to satisfy the condition of payment required by the indemnity laws of many jurisdictions, by precluding the derivatively liable defendant from raising the debtor's insolvency and consequent inability to pay a judgment rendered against it as a sword to defeat its ultimate liability to the non-debtor injured party. See Butner v. United States, 440 U.S. 48, 55, 59 L.Ed.2d 136, 99 S.Ct. 914

(1979)(recognizing the general policy of bankruptcy to prevent "a party from receiving a windfall merely by reason of the happenstance of bankruptcy").

In other words, the debtor's inability to pay a judgment is eliminated as a defense that can be raised by the derivatively liable defendant because section 524 (e) necessarily abrogates and preempts the state law rule of indemnity which requires payment as a condition to the enforcement of a judgment against a derivatively liable defendant. As discussed in more detail below, a payment rule would be in direct conflict with the statute's clear mandate preventing a third party non-debtor's liability form being affected in any way by the debtor's discharge. A contrary rule would insulate tortfeasors from even the most outrageous wrongs merely because a third-party defendant to whom the tortfeasor is liable filed a bankruptcy petition and provide them with an unjustified windfall.

The facts of this case provide a clear illustration why the state law payment rule must yield to section 524 (e). Baroda caused the destruction of Indu Craft's business. As the result of Baroda's destruction of its business, Indu Craft could not fulfill its contractual obligations to Trendi due to no fault of its own and clearly could not pay any liability to Trendi. When sued by Trendi, Indu Craft sued Baroda as the party derivatively liable. Indu Craft's discharge in bankruptcy can not result in a windfall to Baroda and prevent Baroda from accounting for its tortious conduct to the party who suffered the injury. Section 524 (e) must be interpreted in accordance with its plain language to prevent the discharge of Indu Craft from being raised by Baroda as a defense to its derivative liability.

A debtor always as a consequence of receiving a discharge is relieved of its obligation to pay pre-petition claims of its debtors. Those pre-petition claims are converted in the plan of confirmation into allowed claims. See 8 Collier on Bankruptcy, ¶ 1141.01at 1141-3 (15th Rev. ed. 2003). The plan results in new contract between the debtor and its creditors obligating the debtor to perform its obligations in accordance with the provisions of the plan. The District Court was wrong in its conclusion that Indu Craft was relieved of its obligation to pay the bankruptcy judgment because the Plan requires that the allowed claims of its creditors, including Trendi's claim in the form of the bankruptcy judgment, be paid from the proceeds of the funds, if any, it collected from Baroda. Even assuming the District Court was correct that the amount that Indu Craft had to pay Trendi and its other creditors was limited by the amount it collected from Baroda in the fourth party action (although there is no such proviso in the Plan or the bankruptcy judgment), this does not alter the fact that in exchange for receiving a discharge under Chapter 11 of the Bankruptcy Code, Indu Craft took on the burdens of performing its obligations to its creditors under its Plan and one of those burdens was the prosecution of its derivative claim against Baroda and the payment of the allowed claims from the proceeds of any recovery. This payment obligation which Indu Craft was burdened by under its Plan is a sufficient enough obligation permitting Indu Craft to be permitted to claim over against Baroda under Rule 14, Fed. R. Civ. P., since the payment obligations derive from the pre-petition contractual claims of its creditors.

B. Section 524(e) Abrogates the Payment Rule of State Indemnity Law

State law may be preempted where, absent explicit pre-emptive language, Congress has enacted a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'" Pacific Gas & Electric Co. V. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 204, 75 L.Ed.2d 752, 765, 103 S.Ct. 1713, 1722 (1983)(quoting Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982)). Even where Congress has not entirely displaced state regulation, state law may be preempted to the extent it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The payment rule in this case, if applicable, stands as an obstacle to the debtor's efforts to pursue property of its estate in the form of a derivative claim for the benefit of its creditors. To the extent that the payment rule of state indemnity law prevents the debtor from prosecuting its derivative claim against a tortfeasor post-discharge, it is in direct conflict with Section 524 (e). Thus, section 524 (e) abrogates and preempts state indemnity law as interpreted by the courts below to require the insolvent debtor to pay a money judgment against it as a condition to asserting its rights to hold another party derivatively liable to it for the amount of a judgment rendered against it. See also 11 U.S.C. § 1123 (a) and

(b)(3)(B)("Notwithstanding any otherwise applicable non-bankruptcy law, a plan . . . may . . . provide for . . . the retention and enforcement by the debtor . . . of any such claim or interest").

C. Section 524 (e) Is Applicable to All Parties Derivatively Liable to the Debtor

In finding section 524 (e) to be inapplicable to the case at bar, the District Court held that section 524 (e) only applies to insurance companies and sureties. App. 27. This holding is contrary to the clear language of the statute and is contrary to the circuit's earlier decision in Green v. Welsh. Indeed, such a holding yields an absurd result: an insurance company cannot raise the insured's insolvency i.e., its failure to pay, as a defense to its derivative liability under section 524 (e); an adjudicated tortfeasor which engaged in intentionally malicious conduct can. Such a result effectively grants Baroda the benefit of Indu Craft's discharge by insulating it from liability on third party claims and is contrary to the language and intent of the statute.

D. There Is a Conflict among the Circuits as to the Interpretation of § 524 (e)

There is a conflict among the circuit courts as to whether a non-debtor may be released from liability as the result of the discharge of a debtor in bankruptcy. The Courts of Appeals for the Ninth and Tenth Circuits have held that the release of a non-debtor from liability is impermissible under the Bankruptcy Code and, in particular, section 524 (e). See Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985)("The bankruptcy court has no power to discharge the liabilities of a nondebtor pursuant to the consent of creditors as part of a reorganization plan"); In re Lowenschuss, 67 F.3d 1394,

1402 (9th Cir. 1995), ("Section 524 (e) precludes discharging the liabilities of nondebtors"), cert. denied, 517 U.S. 1243 (1996); In re Western Real Estate Fund, Inc., 922 F.2d 592, 601 (10th Cir. 1990)(vacating permanent injunction of claims against nondebtors), modified by Abel v. West, 932 F.2d 898 (10th Cir. 1991). The Fifth Circuit Court of Appeals addressed the non-debtor discharge issue in the context of a settlement agreement and found that an injunction issued by the bankruptcy court enjoining claims against the settling defendants impermissibly discharged non-debtor liabilities. In re Zale, Corp., 62 F.3d 746, 760 (5th Cir. 1995).

The Courts of Appeals for the Second and Fourth Circuits have permitted nonparties to benefit from the discharge of the debtor by enjoining post-discharge claims against them. See In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992); Kane v. Johns-Manville Corp., 843 F.2d 636, 640, 649 (2d Cir. 1988); Menard-Sanford v. Mabey, 880 F.2d 694, 702 (4th Cir 1989), cert. denied, 493 U.S. 959 (1989). The Eleventh Circuit Court of Appeals, in the context of a settlement agreement affirmed the district court's ruling authorizing the bankruptcy court to enjoin nonsettling defendants from asserting contribution and indemnity claims against a nonparty which was integral to the debtor's settlement. In re Munford, Inc., 97 F.3d 449, 455 (11th Cir. 1996).

The Third Circuit has considered the merits of the different courses taken by the circuit courts and has not yet charted its own course. In re Continental Airlines, 203 F.3d 203, 214 (3d Cir. 2000). The Seventh Circuit is beset by conflicting decisions. Compare In re Specialty Equipment Co., 3 F.3d 1043, 1049 (7th Cir. 1993)(finding consensual releases do not run afoul of

section 524 (e)); Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982)(per curiam)(finding predecessor bankruptcy statute prohibited the discharge of non-debtor guarantors, despite provision in plan of confirmation to the contrary).

The Court should grant Indu Craft's Petition for Certiorari. A determination as to whether Baroda is subject to suit post-discharge by Indu Craft on an indemnification claim despite Indu Craft's inability to pay the bankruptcy judgment will give the Court the opportunity to resolve the conflict among the circuit courts with respect to extent, if any, a non-debtor may be able to benefit from the discharge of the debtor and prevent suit against it. It will also resolve an important issue for debtors and creditors alike–the extent to which a debtor may pursue a derivative claim as property of its estate post-confirmation and post-discharge for the benefit of its creditors. Such an issue has widespread importance in this day and age of corporate malfeasance where an insolvent corporate debtor may find it necessary to pursue third party claims against corporate officers for injuries caused by the corporate debtor to third parties.

POINT II

THE UNDERPINNING OF THE COURT OF APPEALS DECISION THAT THE ACT OF CONFIRMATION OF THE PLAN NEGATED THE ALLOWED CLAIMS OF INDU CRAFT'S CLASS 5 CREDITORS IMPROPERLY OVERTURNED THE PLAN

The Court of Appeals misconstrued the Plan in concluding in its Order that the "plan, as approved, seemed to contemplate the continued prosecution of

Indu Craft's fourth party action against Baroda." App. 4. Under well established bankruptcy law, the votes of at least one class of creditors is necessary to confirm a plan of reorganization. 11 U.S.C. § 1129(a)(10). In this case, Indu Craft's Plan was confirmed based on its solicitation of votes from its class 5 impaired creditors holding unsecured claims against the company since every other class of Indu Craft's creditors were fully paid. In soliciting these votes, Indu Craft promised its class 5 impaired creditors that in exchange for their votes for the plan, Indu Craft would assign the proceeds of any recovery obtained from the prosecution of its derivative claim against Baroda. Moreover, section 7.1 (b) of the Plan expressly provides for the funding of "Post-Effective Date claims, including but not limited to Baroda II." App. 88. Post-Effective date claims means claims to be prosecuted by the debtor post-confirmation.

Indu Craft's derivative claim against Baroda constitutes property of its estate and its Plan was crafted to enable Indu Craft to proceed against a derivatively liable defendant for the benefit of its creditors. That is why the Plan provided for the fixing of Trendi's claim post-confirmation; that is why the Plan provided for the entry of an unconditional money judgment against Indu Craft post-confirmation; and that is why the Plan provided for the funding of Indu Craft's post-confirmation litigation against Baroda by one of its creditors. Thus, the Court of Appeals was mistaken in finding that the Plan merely "seemed to contemplate" the continued prosecution of the action against Baroda. The continuation of the action against the Baroda was the only way Indu Craft's Class 5 impaired creditors would receive any funds in payment of their allowed claims and they voted for the Plan solely based upon a prospective recovery from the continued prosecution of

the action against Baroda. Unless Indu Craft was obligated to continue the prosecution of the action against Baroda, no class 5 creditor would have voted for the Plan and there would be no Plan. Instead, they would have cast their vote against the Plan or voted for a plan that would give them a more tangible benefit.

A. The Effect of the Decisions below Is to Overturn an Unravel a Plan That Is Not Subject to Collateral Attack

The District Court's conclusion adopted by the Court of Appeals that "Indu Craft's indemnification claims against Baroda are barred by confirmation of the Plan" does not withstand analysis. App. 24 . Such a finding defies logic because (1) the bankruptcy court would not have in violation of section 524 (a) of the Bankruptcy Code permitted the entry of a money judgment against a debtor ten months after confirmation of the Plan based upon a discharged debt; (2) principles of contract interpretation prevent the Plan from being construed to discharge the very judgment which it authorized be entered against the debtor in § 5.2 of the Plan (see National Gypsum Company v. Prostok, 2000 U.S. Dist. LEXIS 16174, *57 (N.D. Tx. October 3, 2000), aff'd, 2002 U.S. App. LEXIS 13516 (5th Cir. 2002); Ronnen v. Ajax Elec. Motor Corp, 88 N.Y.2d 582, 589, 648 N.Y.S.2d 422, 425, 671 N.E.2d 534, 537 (1996)); (3) the Plan itself in section § 9.1 (c) (App. 77) excepts from discharge judgments entered by the Bankruptcy Court and (4) the discharge of the bankruptcy judgment as the consequence of confirmation of the Plan would render impossible the promise made by Indu Craft to its Class 5 impaired creditors to pay them the proceeds of any recovery in the fourth party action.

If, as the courts below concluded, confirmation of the Plan resulted in the loss of Indu Craft's derivative claim against Baroda, then the same act of confirmation negated the allowed claims of Indu Craft's class 5 creditors because they were to be paid from funds recovered in the derivative action. The inescapable conclusion which necessarily flows from the finding that confirmation of the Plan "barred" prosecution of the derivative claim against Baroda is that the Plan was not proposed in good faith, was violative of law, did not provide adequate means of implementation, and deprived the impaired class of any property of value, all contrary to the express findings of the Bankruptcy Court.. App. 92-94; 11 U.S.C. §§ 1129 (b)(2)(C)(1) and 1129 (b)(2)(B)(i). In effect, the promise made to Indu Craft's class 5 creditors in exchange for their votes in favor of the Plan, which was approved by the Bankruptcy Court, was illusory. The effect of the opinions below is to overturn the Plan because the Bankruptcy Court does not have the power to confirm plans which do not comply with applicable provisions of the Bankruptcy Code. 11 U.S. C. § 1129(a); In re Lowenschuss, 67 F.3d at 1401. The District Court was simply wrong in its opinion that Trendi made an "ill advised" agreement which did not take into account state indemnity law. App. 14. That "ill advised" agreement is a central component of the Plan. A Plan is unconfirmable if it is violative of law under 11 U.S.C. § 1129 (a)(3). The Plan, however, is a final unappealed and unappealable order of the Bankruptcy Court and is not subject to collateral attack by Baroda, which was a party in interest in Indu Craft's Bankruptcy proceedings. App. 37; Stoll v. Gottlieb, 305 U.S. 165, 171-172, 59 S.Ct. 134, 137-138, 83 L.Ed. 104, 108-109 (1938); Adair v. Sherman, 230 F.2d 890, 894 (7th Cir. 2000). Thus, the opinions below, which in no uncertain terms have nullified the Plan, must be reversed by this Court in the

exercise of its supervisory powers.

B. Baroda Lacked Standing to Raise the Discharge Argument in the District Court

Exclusive jurisdiction over property of the estate of the debtor has been referred to the Bankruptcy Court by the District Court and, therefore, the Bankruptcy Court is a court of original jurisdiction. In Celotex Corporation v. Edwards, 514 U.S. 300, 313, 131 L.Ed.2d 403, 115 S.Ct. 1493 (1995), this Court held that a party may not collaterally attack an injunction issued in the Bankruptcy Court in the District Court because "'it is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.'" Here, Baroda has attacked the dischargeability of Trendi's claim under the Plan and the validity of the bankruptcy judgment in the District Court, notwithstanding that it was a party in interest in Indu Craft's bankruptcy proceeding. App. 14. The Plan specifically provided for the retention of original jurisdiction in the Bankruptcy Court to "[d]etermine any dispute arising under or related to the plan, including, without limitation, any dispute concerning the scope or effect of any release or discharge provided for the plan or the confirmation order." App. 46, 48. The Bankruptcy Court is uniquely suited to decide such issues, especially since the answer to that question in this case requires an interpretation of the Plan and the intent of the parties if the Plan is ambiguous. See In re Shondel, 950 F.2d 1301, 1308 (7th Cir. 1991)("'the bankruptcy court would be vested with authority to determine not only the bankrupt's right to a discharge but also the effect of a discharge when granted'").

Moreover, as a result of the decisions below, Indu Craft's class 5 creditors have been denied the distribution of proceeds that they were promised in exchange for their votes for the Plan and the determination of these Plan issues, as a matter of due process since they affect the rights of non-parties to the District Court action, required an adjudication by the court of the first instance. There is no conceptual difference between the impermissible collateral attack on the injunction order in Celotex and the collateral attack by Baroda on the confirmation order in this case which provided for the entry of judgment against Indu Craft based on the allowed claim of Trendi as the central component of Indu Craft's Plan. Recognizing and permitting such an attack "seriously undercut[s] the orderly process of law" and requires reversal. Celotex, 514 U.S. at 313.

POINT III

THE EXERCISE OF THE COURT'S SUPERVISORY POWERS IS NECESSARY TO GIVE EFFECT TO THE FEDERAL BANKRUPTCY JUDGMENT

The fundamental inconsistency of the decisions below is that they did not find the bankruptcy judgment to be a void judgment. However, at the same time, they concluded that Indu Craft was not obligated to pay the bankruptcy judgment because the underlying Trendi claim upon which it was based had been discharged. The simple fact is that the Plan contemplated the entry of a post-confirmation judgment in favor of Trendi against Indu Craft which would allow Indu Craft to continue the prosecution of its fourth party action against Baroda by seeking to hold Baroda liable for the amount of the bankruptcy judgment.

The entry post-confirmation of an unconditional money judgment by the Bankruptcy Court against Indu Craft is like any other judgment rendered by any other court and carries with it the full panoply of rights afforded to judgment creditors under the Federal Rules of Civil Procedure. See Rule 69, Fed. R. Civ. P.; Stoll v. Gottlieb, 305 U.S. at 171 ("[T]he judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of the state as those of its own court in a like case and under similar circumstances. . . . But where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition'"). As such, the conclusion that Indu Craft was not obligated to pay the bankruptcy judgment as the basis for dismissal of the amended fourth party complaint or, in other words, the bankruptcy judgment cannot be enforced against Indu Craft cannot stand. Since the bankruptcy judgment is a judgment like any other judgment, Indu Craft is entitled to claim over for the amount of the judgment under Rule 14, Fed. R. Civ. P., against Baroda as a party which is or may be liable for the judgment.

What the District Court held defies logic and raises issues of fundamental fairness. The federal bankruptcy judgment according to the District Court could not be enforced against Indu Craft because the underlying claim was discharged, but contradictorily the District Court concluded that the bankruptcy judgment was sufficiently valid to cut off Trendi's rights by using the judgment as the basis for dismissing Trendi's second third party complaint against Baroda. The bankruptcy judgment cannot be null and void as to the debtor, but sufficiently valid to terminate the rights of creditors with respect to third parties. Indu Craft's Petition for

Certiorari should be granted because the exercise of the Court's supervisory powers is necessary to give life to the federal bankruptcy judgment which the courts below incorrectly ruled to be unenforceable but not void.

CONCLUSION

For the foregoing reasons, Indu Craft's Petition for a Writ of Certiorari should be granted.

Dated: **New York, New York**
October 6, 2003

Respectfully submitted,

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No. 02-7173(L), 02-7455(CON), 02-7487(CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BANK OF INDIA,
Plaintiff-Appellee,

v.

TRENDI SPORTSWEAR, INC.,
Defendant-Third-Party-Plaintiff-Appellant,

v.

INDU CRAFT, INC.,
Third-Party-Defendant-Fourth-Party-Plaintiff-Appellant,

v.

The BANK OF BARODA,
Fourth-Party-Defendant-Appellee.

May 15, 2003, Decided

COUNSEL: For Defendant-Third-Party-Plaintiff-Appellant, Trendi Sportswear, Inc.: KRISHNAN S. CHITTUR, Chittur & Associates, P.C., New York, NY.

For Third-Party-Defendant-Fourth-Party-Plaintiff-Appellant, Indu Craft, Inc.: JOHN D'ERCOLE (Christine A. Black, Jonathan A. Kramer, on the brief), Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York, NY.

For Fourth-Party-Defendant-Appellee, Bank of Baroda: ROBERT P. STEIN (Jeffrey R. Mann, on the brief), Greenberg Traurig, LLP, New York, NY.

JUDGES: Present: HONORABLE WILFRED FEINBERG, HONORABLE ROBERT A. KATZMANN, Circuit Judges, HONORABLE J. GARVAN MURTHA, n1 District Judge.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Southern District of New York (Martin, J.), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

The plaintiff Bank of India ("BOI") sued the defendant-third-party-plaintiff Trendi Sportswear, Inc. ("Trendi") in 1989 for default upon a demand promissory note. Trendi then filed a third-party complaint against Indu Craft, Inc. ("Indu Craft") in 1990, alleging breach of contract to supply Trendi with goods and that such breach caused Trendi to seek higher lines of credit from BOI so that Trendi could import the goods itself in an effort to mitigate damages caused by Indu Craft's breach. Indu Craft in turn filed a fourth-party complaint against Bank of Baroda ("Baroda"), also in 1990, in which it claimed that Indu Craft's breach of its contract with Trendi was caused by Baroda's wrongful, malicious, bad faith curtailment of its credit privileges, and sought to hold Baroda liable for any judgment Indu Craft had to pay to Trendi as a result of the third-party action.

Then pending before a different District Court was an action filed in 1987 by Indu Craft against Baroda

claiming that Baroda had driven Indu Craft out of business by extinguishing its credit facilities ("the 1987 action"). The District Court in the 1987 case granted Baroda's motion to preclude evidence related to damages caused to Trendi (a non-party in the 1987 litigation) by Indu Craft as a result of Baroda's allegedly illegal behavior. After a month-long trial, a jury found in Indu Craft's favor, awarding some $ 2.5 million in damages.

The District Court in this action granted summary judgment in BOI's favor in April 1991. In September 1998, it then granted Baroda's motion for summary judgment, dismissing Indu Craft's fourth-party complaint on the grounds of res judicata because Indu Craft should have raised its claim for damages owed to Trendi as a result of Baroda's bad acts ("Trendi damages") in the 1987 action.

Indu Craft filed a petition for bankruptcy relief in July 1997, and Trendi filed a claim in the bankruptcy proceeding for the damages alleged in the third-party action in this case. Following the District Court's dismissal of the fourth-party complaint on res judicata grounds, the District Court in February 1999 ordered the BOI case closed on the active docket without prejudice to reopen it at any time, since the third-party complaint was set to be litigated in the bankruptcy court.

By Final Decree signed May 17, 2000, the bankruptcy court discharged Indu Craft from all claims of creditors, as provided for in the bankruptcy plan of reorganization, and enjoined the holders of claims from instituting or continuing any action to collect such debts. Unless the plan or a final order of the bankruptcy court provided otherwise, any judgment at any time obtained determining the liability of Indu Craft with respect to a

debt discharged pursuant to the plan "shall be null and void and of no force and effect." The plan, as approved, seemed to contemplate the continued prosecution of Indu Craft's fourth-party action against Baroda. Indu Craft consented to judgment being entered against it in the third-party action in the amount of Trendi's unsecured bankruptcy claim. By order dated July 12, 1999, the bankruptcy court resolved the claims dispute between Indu Craft and Trendi, finding that Trendi's unsecured class 5 claim shall be fixed at $ 21,101,348.47.

By letter dated November 24, 1999, Trendi's counsel requested the District Court to enter judgment against Indu Craft in the amount of Trendi's allowed unsecured claim in bankruptcy, that is, $ 21,101,348.47. The District Court endorsed this letter, stating that to the extent Trendi was entitled to a judgment, the judgment should be entered by the bankruptcy court, given that the matter had been adjudicated by the bankruptcy court. The Clerk of the bankruptcy court then entered judgment against Indu Craft in this amount on January 18, 2000.

The District Court entered final judgment in this case on March 30, 2000, finding that no claims remained unresolved. Indu Craft then appealed the dismissal of its fourth-party complaint on res judicata grounds. We reversed the decision of the District Court to grant Baroda's motion to dismiss and remanded the case, finding that Indu Craft had not had a full and fair opportunity to raise the issue of Trendi damages in the 1987 case and thus should not be barred by principles of res judicata from raising it in the fourth-party action here. Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428, 439-40 (2d Cir. 2000).

Upon remand, Indu Craft in April 2001 filed an amended fourth-party complaint demanding a jury trial and adding claims against Baroda of negligent supervision of an agent and RICO, and Trendi in July 2001 filed a second third-party complaint asserting direct claims against Baroda for prima facie tort, tortious interference with contract, lost profits, destruction of business, negligent supervision of an agent, and RICO.

The District Court by decision dated January 17, 2002 dismissed the amended fourth-party complaint, ruling that Indu Craft's indemnification claim must fail as a matter of law pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because Trendi's claim against Indu Craft had been discharged in bankruptcy and that Indu Craft's RICO claims were time-barred and barred by the doctrine of res judicata. See Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 894, No. 89 Civ. 5996, 2002 WL 84631 (S.D.N.Y Jan 18, 2002). Final judgment was entered by the District Court on April 11, 2002.

Trendi moved to vacate the final judgment, alleging that its direct claims against Baroda, asserted in its second third-party complaint, were still pending. By opinion dated August 7, 2002, the District Court dismissed Trendi's direct claims against Baroda as time-barred and denied Trendi's motion to vacate the final judgment. See Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 14801, 89 Civ. 5996, 2002 WL 1836754 (S.D.N.Y. Aug. 12, 2002). This appeal followed, challenging the January 17 and August 7, 2002 opinions of the District Court.

As this brief recitation of this litigation -- begun in the 1980s – reveals, this case has had a long and convoluted history, perhaps made more difficult to penetrate by its

circuitous path from one judicial forum to another and back again. Upon review of the record and consideration of all of the arguments presented by the parties, we affirm the dismissal of the amended fourth-party complaint and the second third-party complaint, largely for the reasons stated in the opinions of the District Court.

The judgment of the District Court is AFFIRMED.

FOOTNOTES

n1 The Honorable J. Garvan Murtha of the United States District Court for the District of Vermont, sitting by designation.

89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-v.-

TRENDI SPORTSWEAR, INC.,
Defendant and Third Party Plaintiff,

-v.-

INDU CRAFT,
Third Party Defendant and Fourth Party Plaintiff,

-v.-

BANK OF BARODA,
Fourth Party Defendant.

August 7, 2002, Decided
August 12, 2002, Filed

COUNSEL: For Bank of India, PLAINTIFF: Lynn A Dummett, Rajiv Khanna, Leboeuf, Lamb, Leiby & MacRae, New York, NY USA.

For Trendi Sportswear, Inc, THIRD-PARTY PLAINTIFF: Jonathan A Chase, Eaton & Van Winkle, New York, NY USA.

For Indu Craft, Inc, THIRD-PARTY DEFENDANT: David Clifford Burger, Robinson, Brog, Leinwand, Greene, Genovese & Gluck, PC, New York, NY USA.

JUDGES: JOHN S. MARTIN, JR., U. S. D. J.

OPINIONBY: JOHN S. MARTIN, JR.

OPINION:

OPINION & ORDER

JOHN S. MARTIN, Jr., District Judge:

Defendant-third party plaintiff Trendi Sportswear, Inc. has made an application for an Order vacating the Final Judgment in this case, entered April 11, 2002, because claims asserted by Trendi directly against Bank of Baroda in its Second Third Party Complaint remained pending at the time of that judgment. Trendi is correct that the Court's decision of January 18, 2002, Bank of India v. Trendi Sportswear, Inc., No. 89 Civ. 5996, 2002 U.S. Dist. LEXIS 894, 2002 WL 84631 (S.D.N.Y. Jan. 18, 2002), dismissing Indu Craft's First Amended Fourth Party Complaint, did not deal with the issues raised by Trendi's Second Third Party Complaint.

Bank of India ("BOI") commenced this action against Trendi in September 1989, seeking payment of funds owed to BOI by Trendi pursuant to a Note and other credit facilities. On May 4, 1990, Trendi filed a Third Party Complaint against Indu Craft, alleging that Indu Craft's failure to supply goods to Trendi in accordance with their contract had caused Trendi to default on its obligations to BOI. In addition, the Third Party Complaint sought lost profit damages in the amount of $ 2,818,640, and $ 2,300,000 for loss of business reputation and good will, both of which were alleged to be the direct result of Indu Craft's breach of contract. On June 21, 1990, Indu Craft, in turn, filed a fourth party complaint against Bank of Baroda ("Baroda"), seeking

indemnification in the event that Indu Craft was found liable to Trendi.

In April 1991, the Court awarded summary judgment for BOI against Trendi. This left only the third and fourth party claims, which had been stayed in October 1990, pending the resolution of a related action before Judge Duffy. n1 Despite the termination of that action in Indu Craft's favor after a trial before Magistrate Judge Bernikow in July 1992, Indu Craft filed for protection under Chapter 11 of the Bankruptcy Code on July 25, 1997. Trendi then filed a claim in the bankruptcy proceeding for the damages alleged in the Third Party Complaint in this case. Indu Craft subsequently consented to entry of judgment against it in that proceeding in the amount of $ 21,101,348.47 for damages to Trendi's business as a result of Indu Craft's inability to deliver goods as required pursuant to contracts between Indu Craft and Trendi. Bankruptcy Judge Gallet entered Final Judgment in favor of Trendi in that amount.

In the Plan of Reorganization in the Indu Craft bankruptcy, Trendi agreed that it would limit its enforcement of its judgment against Indu Craft to "the net proceeds of any recovery in Baroda II" (which was defined in the Plan, § 1.37, as the fourth party action in this case). Pursuant to that Plan, Indu Craft was discharged and released from bankruptcy on May 17, 2000.

Meanwhile, this Court granted summary judgment in Baroda's favor on grounds of res judicata, and Final Judgment was entered against Indu Craft on March 29, 2000. That judgment recited that "the claims in the Third-Party action between Trendi and Indu have been resolved by final judgment entered in the U.S.

Bankruptcy Court case 97 B 44958 in favor of Trendi against Indu on 1/18/00 in the amount of $ 21,101,348.47 . . ."

Subsequently, the Order granting summary judgment in favor of Baroda was reversed by the Second Circuit and remanded for further consideration. Bank of India v. Trendi, 239 F.3d 428 (2d Cir. 2000). Indu Craft then filed a First Amended Fourth Party Complaint adding claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c),(d). In addition, on July 30, 2001, Trendi filed a Second Third Party Complaint, to assert, for the first time, claims directly against Baroda. By an Opinion and Order dated January 18, 2002, Indu Craft's Amended Complaint was dismissed in its entirety. Trendi's Second Third Party Complaint against Baroda, in which Trendi asserts claims of prima facie tort, tortious interference with contract, and claims pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 et seq., remains.

Baroda argues, as it has before, that the impleader is improper. n2 It adds that the Second Third Party Complaint should be stricken because it was filed without leave of the Court, and argues that Trendi's claims, which relate to events that took place 15 years ago, are time-barred. Trendi responds that pursuant to Rule 14, Fed. R. Civ. P., which governs third party practice, it (as plaintiff in the third party action) may bring a complaint against Baroda, the fourth party defendant (third party defendant in the third party action) at any time without leave of court. Furthermore, Trendi argues that under Fed. R. Civ. P., Rule 15(c), its Second Third Party Complaint against Baroda relates back to the date of its original Third Party Complaint against Indu Craft.

Rule 14(a)

Trendi is correct that under Fed. R. Civ. P. Rule 14(a), once Indu Craft properly asserted its fourth party claim against Baroda, Trendi was not required to seek leave of court to either amend its original third party complaint or to file a supplemental complaint against Baroda. Marriott Corp. v. Dysart, 103 F.R.D. 15, 17 (E.D. Pa. 1984) ("The rule imposes no burden upon plaintiff to seek leave of court to file a claim against a third party defendant.")(citing Straub v. Desa Industries, Inc., 88 F.R.D. 6, 8 (M.D. Pa. 1980)). See also Wasik v. Borg, 423 F.2d 44, 46 (2d Cir. 1970) ("Rule 14(a) specifically contemplates that the plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."). Thus, in Northbrook Nat'l Ins. Co. v. J & R Vending Corp., 167 F.R.D. 643, 646 (E.D.N.Y. 1996), the court stated that:

The court declines to hold that Northbrook must amend its original complaint and instead finds that Northbrook has the option - exercised here - to proceed by a direct action in a separate complaint against the fifth party defendant, Robertshaw, as was recognized by Dysart v. Marriott, supra. In the absence of any statutory indication that leave is required, the court is reluctant to impose any such requirement under Rule 14(a) Fed. R. Civ. P. Nor would it be appropriate to incorporate the leave requirements of Rule 15(a) of the Federal Rules of Civil Procedure since this provision is only applicable to an amendment to a party's pleading. The plaintiff here has not chosen to proceed by amendment of its pleading, but instead by asserting a direct claim against the third-party defendant in a new pleading.

Similarly, here, Trendi has filed a new pleading - its Second Third Party Complaint - against Baroda, and the same reasoning applies.

Moreover, Trendi is correct that Fed. R. Civ. P. 14(a) does not impose a time limit within which the plaintiff must assert any claims that it may have against the third party defendant. In the Marriott case, the court stated:

Whereas, F.R.C.P. 14(a) provides a grace period of ten (10) days for a defending party to join a third-party defendant without leave of court, it does not specifically require that a plaintiff seek leave of court, regardless of when he files. Thus, it appears to follow that the plaintiff may do so at any time before the statute of limitations has run.

103 F.R.D. at 18.

In this case, however, at the time that Trendi filed its Second Third Party Complaint on July 30, 2001, the statutes of limitations clearly had run on claims based in the events that are alleged in that pleading, all of which took place in 1987. n3 Trendi argues that, the statute of limitations does not bar its claims because, pursuant to Rule 15(c), Fed. R. Civ. P., the Second Third Party Complaint relates back to the date of Trendi's original pleading, i.e., its original Third Party Complaint against Indu Craft.

Rule 15(c)

The problem with Trendi's contention that it can rely on Rule 15(c), is that the Rule applies only to an "amendment of a pleading." As set forth above, the reason Trendi did not need to obtain leave of the Court to file its Second Third Party Complaint under Rule

15(a), was that it was not amending its pleading. Instead, it was filing an independent third party complaint pursuant to Rule 14. It is difficult to see how Trendi's Second Third Party Complaint could be an amendment of a pleading under Rule 15(c) if it was not an amendment under Rule 15(a).

The court need not resolve that issue, however. The fact that Bankruptcy Judge Gallet entered judgment in Trendi's favor against Indu Craft on the claims included in the Third Party Complaint on July 12, 1999, and the Bankruptcy Court entered Final Judgment on those claims on January 18, 2000, would, in any event, be fatal to Trendi's claim that it can rely on Rule 15(c). As the court held in United States v. Int'l Brotherhood of Electrical Workers. 72 F.R.D. 507, 513 (E.D. La. 1976), aff'd, 573 F.2d 1308 (5th Cir. 1978), "neither Rule 15(c), permitting the relation back of amendments, nor Rule 15(d), permitting supplemental amendments, is applicable in a post-judgment situation." Cf. Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking, 71 F.3d 1361, 1368 (7th Cir. 1995); First Nat'l Bank v. Continental Ill. Nat'l Bank, 933 F.2d 466 (7th Cir. 1991)(The presumption in favor of liberality in granting motions to amend under Rule 15(a) is reversed after judgment has been entered.). This rule reflects the fact that a party who waits to amend its pleadings until after judgment has been entered defeats the purpose of Rule 14, which is to avoid circuitry and multiplicity of actions.

Once judgment has been entered, a party seeking to amend its pleadings must move to vacate the judgment under Fed. R. Civ. P. Rule 59(e) or Rule 60(b). Id. at 468; see also Roque v. City of Redlands, 79 F.R.D. 433, 435 (C.D. Cal. 1978). This Trendi has explicitly chosen not to do. In his letter to the Court dated July 30, 2001,

conveying a copy of the Second Third Party Complaint, Trendi's counsel stated, "Trendi has served this Complaint in the alternative and without prejudice to Trendi's judgment against Indu Craft, . . . and Trendi's rights to participate in and protect the judgment from the United States Bankruptcy Court in its favor." Simply put, Trendi could not have it both ways.

Trendi argues that in the January 18, 2002 Opinion and Order, this Court held that the Bankruptcy Court judgment in Trendi's favor against Indu Craft was null and void. However, in that Opinion, the Court never questioned the validity of the Bankruptcy Court's judgment. It merely held that Indu Craft's indemnification claim against Baroda failed to state a cause of action as a matter of New York law, and that therefore Trendi's agreement to limit its recovery on its judgment against Indu Craft to the proceeds, if any, of the prosecution of that claim by Indu Craft, would preclude Trendi from collecting on its judgment. While Trendi may well have made an ill-advised agreement, which did not take adequate account of New York law regarding indemnification, that agreement was, nevertheless, the basis upon which the judgment of the Bankruptcy Court was entered. It also was incorporated into the Plan of Reorganization, and consequently, into that court's Discharge Order. That judgment was entered, and has not been set aside. Therefore, there is no complaint to amend. Pena v. Mattox, 84 F.3d 894, 903 (7th Cir. 1996).

Finally, even if the Court were to be presented by Trendi with a motion under Rule 60(b), Fed. R. Civ. P., to vacate the judgment entered in its favor against Indu Craft, so that it could then move to amend its third party complaint, it would not be granted at this juncture. Trendi has been fully advised of Indu Craft's claims against Baroda for many years, and, assuming for this

purpose that a pleading stating its own direct claims against Baroda would have constituted an amendment of its Third Party Complaint, it could have filed such a pleading, without leave of court, at any time between the filing of Indu Craft's Fourth Party Complaint on June 21, 1990, and the entry of Final Judgment by the Bankruptcy Court on January 18, 2000. Why it failed to do so remains unexplained. As the Court stated in Figgie Int'l, Inc. v. Miller, 966 F.2d 1178, 1181 (7th Cir. 1992), "in a post-judgment situation, delay without explanation is sufficient reason to deny a motion to amend." Although the leave provisions of Rule 15(a) are not directly relevant here, it is instructive that under Rule 15(a), even prior to judgment, "if a lengthy delay exists before a motion to amend is made, it is incumbent upon the movant to offer a valid explanation for the delay." Evans v. Syracuse City School Dist., 704 F.2d 44, 47 (2d Cir. 1983). Cf. Deere v. Goodyear Tire and Rubber Co., 175 F.R.D. 157, 166 (N.D.N.Y. 1997) ("Denial of a motion to amend is appropriate when the sole reason for the undue delay is ignorance of the law.); Wells v. HBO & Co., 813 F. Supp. 1561 (N.D. Ga. 1992)(stating with respect to Rule 15(c)(3), that "even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset."); Boyle v. Texasgulf Aviation, Inc., 696 F. Supp. 951, 956 (S.D.N.Y. 1988), aff'd, 875 F.2d 307 (2d Cir. 1989)(The longer the period of unexplained delay, the less the opposing party must show by way of prejudice.); Reborn Enterprises, Inc. v. Fine Child, Inc., 590 F. Supp. 1423, 1449 (S.D.N.Y. 1984), aff'd, 754 F.2d 1072 (2d Cir. 1985) (stating, in a pretrial situation, that "lack of diligence is reason enough [to refuse to permit amendment] . . . [Plaintiff] has had the facts necessary to make the two new allegations proposed throughout this litigation, but has unduly delayed in asserting them.").

Accordingly, the claims asserted in Trendi's Second Third Party Complaint do not relate back to the date of filing Trendi's original Third Party Complaint, and the Second Third Party Complaint is dismissed as time-barred.

Conclusion

For the foregoing reasons, Trendi's Second Third Party Complaint against Baroda is dismissed, and Trendi's motion to vacate the Final Judgment of this Court entered on April 11, 2002, is denied.

SO ORDERED.

Dated: New York, New York
August 7, 2002

JOHN S. MARTIN, JR.
U. S. D. J.

FOOTNOTES

n1 The stay was lifted on December 2, 1997.

n2 The propriety of both the third and fourth party complaints in this action was previously decided in the January 18, 2002 Opinion and Order. Bank of India v. Trendi, 2002 U.S. Dist. LEXIS 894, 2002 WL 84631, at *3.

n3 In the January 18, 2002 Opinion and Order granting Baroda's motion to dismiss Indu Craft's First Amended Fourth Party Complaint, the Court held that Indu Craft's RICO claims, first asserted in 2001, were time-barred. Pursuant to the same reasoning, Trendi's similar claims also are barred, unless they relate back to Trendi's original pleading in this action. As stated in that

Opinion, Trendi's claim that it suffered an additional later injury when this Court dismissed Indu Craft's First Amended Fourth Party Complaint in January 2002, does not withstand scrutiny in light of this Circuit's adoption of the "injury discovery rule" for RICO cases. See Bank of India v. Trendi, 2002 U.S. Dist. LEXIS 894, 2002 WL 84631, at *8-9.

89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-v.-

TRENDI SPORTSWEAR, INC.,
Defendant and Third Party Plaintiff,

-v.-

INDU CRAFT,
Third Party Defendant and Fourth Party Plaintiff,

-v.-

BANK OF BARODA,
Fourth Party Defendant

January 17, 2002, Decided
January 18, 2002, Filed

COUNSEL: For Third Party Plaintiff: Krishnan S. Chittur, Law Office of Krishnan Chittur, New York, N.Y.

For Third Party Defendant-Fourth Party Plaintiff: John D'Ercole, Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York, N.Y.

For Third Party Defendant-Fourth Party Plaintiff: Terrance G. Reed, Law Offices of Terrance G. Reed, Alexandria, Virginia.

For Fourth Party Defendant: Robert P. Stein, Greenberg Traurig, LLP, New York, N.Y.

JUDGES: John S. Martin, Jr., U. S. D. J.

OPINIONBY: John S. Martin, Jr.

OPINION:

OPINION AND ORDER

JOHN S. MARTIN, Jr., District Judge:

Fourth Party Defendant Bank of Baroda ("Baroda") moves to dismiss the First Amended Fourth Party Complaint on the grounds that (1) it is not a proper impleader action within the meaning of Rule 41, Fed. R. Civ. Proc., (2) the indemnification claim does not state a cause of action, and (3) the claims under the Racketeer Influenced and Corrupt Organizations Act are barred by both res judicata and the statute of limitations.

The fourth party action is all that remains of this matter after more than ten years of litigation between these parties. The facts that underlie this dispute are set out in detail in Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2d Cir. 2000), Indu Craft, Inc. v. Bank of Baroda, 87 F.3d 614 (2d Cir. 1996), Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490 (2d Cir. 1995), Indu Craft, Inc. v. Bank of Baroda, 1991 U.S. Dist. LEXIS 7856, No. 87 Civ. 7379, 1991 WL 107438 (S.D.N.Y. June 11, 1991), Indu Craft, Inc. v. Bank of Baroda, 1993 U.S. Dist. LEXIS 17937, No. 87 Civ. 7379, 1993 WL 535116 (S.D.N.Y. Dec. 17, 1993), Indu Craft, Inc. v. Bank of Baroda, 1995 U.S. Dist. LEXIS 11430, No. 87 Civ. 7379, 1995 WL 479516 (S.D.N.Y. Aug. 10, 1995), and previous opinions in this case dated January 29, 1991 and September 14, 1998.

They will not be repeated here, except as necessary to deal with the issues now before the Court.

Indu Craft is a New York corporation, which was formerly in the business of importing garments from several Asian countries and selling them to customers in the U.S. through its commonly owned affiliate, Trendi Sportswear, Inc. ("Trendi"). n1 A line of credit from Baroda made it possible for Indu Craft to conduct its importing business. Trendi relied, in turn, on credit facilities from Bank of India ("BOI") to finance its activities. n2 In this connection, on December 5, 1985, Trendi executed a Demand Promissory Note and a General Security Agreement to BOI, each in the amount of $ 500,000.

Beginning in March 1987, Baroda reduced Indu Craft's advance limit, and began to delay and refuse to issue letters of credit for Indu Craft's benefit. These delays and refusals seriously damaged Indu Craft's business as its suppliers either delayed shipment of goods or entirely stopped producing goods for its account. As a result, Indu Craft was unable to supply goods to Trendi in a timely manner, and ultimately ceased operations in November 1987. Indu Craft's inability to supply goods to Trendi allegedly caused Trendi to default in turn on its debt to BOI.

On October 15, 1987, Indu Craft filed an action against Baroda and others, alleging that Baroda had breached the covenant of good faith and fair dealing implied in the credit agreement, tortiously interfered with Indu Craft's contracts, and committed a prima facie tort in retaliation for Indu Craft's decision not to invest in an investment opportunity offered to it by Baroda's principal officer in New York (the "1987 action"). This case, Indu Craft, Inc. v. Bank of Baroda, 87 Civ. 7379,

ultimately was tried in July 1992, and resulted in a verdict in Indu Craft's favor in the amount of $ 2,519,822.29 (after adjustment on appeal).

Meanwhile, in September 1989, BOI commenced this action against Trendi, seeking payment of (1) $ 500,000, plus interest, due on the Note, and (2) $ 1,844,895.19, plus interest, for Trendi's default on other credit facilities extended by BOI. In May 1990, Trendi filed a third party action against Indu Craft, alleging that Indu Craft's failure to supply goods in accordance with its contract had caused Trendi's default in its obligations to BOI. The third party complaint also sought lost profit damages in the amount of $ 2,818,640.66, and $ 2,300,000 for loss of business reputation and good will, both of which, it alleged, were the direct result of Indu Craft's breach of contract. Indu Craft then filed a fourth party complaint against Baroda, seeking indemnification in the event that Indu Craft was found liable to Trendi.

In 1990 and 1991, Indu Craft made several attempts to have Trendi's third party claims, and its own corresponding indemnification claims against Baroda, heard in the 1987 action. In October 1990, this Court stayed the third and fourth party claims in this case, pending the resolution of the 1987 Action. Then, in April 1991, BOI was awarded summary judgment against Trendi in the amount of $ 1,844,895.19, plus $ 400,000 in interest. Nevertheless, Indu Craft was precluded from presenting evidence of damages to Trendi during the trial of the 1987 Action.

On July 25, 1997, Indu Craft filed for protection under Chapter 11 of the Bankruptcy Code, and Trendi filed a claim in the bankruptcy proceeding for the damages alleged in the third party complaint in this case. Subsequently, Indu Craft consented to entry of judgment

against it in that proceeding in the amount of $ 21,101,348.47 for damages to Trendi's business as a result of Indu Craft's inability to deliver goods as required pursuant to contracts between Indu Craft and Trendi. The amount of this judgment was not the subject of litigation.

The Plan of Reorganization (the "Plan") provided, in § 5.2, that Trendi, ANZ (an unrelated party), and Hemant Mehta (the owner of both Indu Craft and Trendi) would "receive the net proceeds of any recovery in Baroda II [defined in the Plan, § 1.37, as the fourth party action in this case], . . . after deduction for the reimbursement to Tze Wung Consultants, Ltd ("Tze Wung") of its funding of the Plan, the funding of the Baroda II litigation pursuant to a future agreement, legal fees, costs and disbursements." The Plan went on to state that, "The Debtor consents to judgment being entered against it in the third party action in Baroda II for the amount of Trendi's claim as determined in the Bankruptcy Court." (Notice of Motion, Ex. E at 16, § 5.2; Ex. H at 3, P 1.) Thus, the Plan clearly contemplated that Indu Craft would pursue its fourth party indemnification claim against Baroda. However, it is also important to note that the Disclosure Statement dated November 20, 1997, stated that "there can be no assurance that the Debtor will recommence the litigation in Baroda II, or that such litigation, if commenced would be resolved in the Debtor's favor." (Notice of Motion, Ex. C at 31 ("Risk Factors").)

Indu Craft was discharged and released from bankruptcy on May 17, 2000. The Discharge Order stated that "the Debtor is discharged and released from any and all claims of creditors; and . . . the holders of claims against the Debtor are enjoined and restrained from

instituting or continuing any action to collect such debts." (Notice of Motion, Ex. N at 2.)

I. The Propriety of the Impleader

Baroda now claims, as it has in previous motions, that the third and fourth party complaints do not state proper impleader claims under Fed. R. Civ. Proc. Rule 14(a). As the Second Circuit stated in Indu Craft, Inc. v. Bank of Baroda, 239 F.3d 428, 438 (2d Cir. 2000),

to sustain an impleader action, the third party defendant, or in this case, the fourth party defendant "must be liable secondarily to the original defendant, or that the third party [or fourth party] must necessarily be liable over to the defendant [or third party defendant] for all or part of the plaintiff's [or third party plaintiff's] recovery, or that the defendant [or third party defendant] must attempt to pass on to the third party [or fourth party] all or part of the liability asserted against the defendant [or third party defendant]." This means that the impleader action must be dependent on, or derivative of, the main or third party claim.

(emphasis added)(citations omitted).

The Second Circuit went on to find that this Court, and it, had ancillary jurisdiction over Trendi's third party claim against Indu Craft and Indu Craft's fourth party claim against Baroda. It declined to determine the propriety of the impleader actions, leaving that issue for determination by this Court in the first instance. Id.

It may well be true, as Baroda argues, that the third party complaint did not constitute a proper impleader action, since Indu Craft's liability to Trendi, if any, was not dependent on Trendi's being found liable to BOI

pursuant to the Demand Promissory Note and General Security Agreement. However, at this juncture, that third party claim has been terminated by the judgment for Trendi against Indu Craft in the Bankruptcy Court, and the only part of this action that remains is the fourth party claim by Indu Craft against Baroda. n3 That fourth party claim does meet the criteria for a proper impleader action because the fourth party plaintiff (Indu Craft) is attempting to pass on to the fourth party defendant (Baroda) all or part of the liability asserted against it by the third party plaintiff (Trendi). The claim by Indu Craft against Baroda is derivative of Trendi's claim against Indu Craft in that Indu Craft would have no claim against Baroda if it were not itself found to be liable to Trendi. Thus, the liability of the fourth party defendant is dependent upon the outcome of the third party claim, as required by Rule 14. See Int'l Paving Systems, Inc. v. Van-Tulco, Inc., 866 F. Supp. 682, 686-87 (E.D.N.Y. 1994). Accordingly, this Court finds, in its discretion, that the First Amended Fourth Party Complaint states a permissible impleader claim.

II. The Indemnification Claims

The next question is whether Indu Craft's indemnification claims against Baroda are barred by the confirmation of the Plan and Indu Craft's discharge under Chapter 11 of the Bankruptcy Code. It is black letter law in New York that an indemnification claim does not arise until the party seeking indemnification has an out-of-pocket loss to be reimbursed. Perno v. For-med Medical Group, P.C., 176 Misc. 2d 655, 673 N.Y.S.2d 849, 851 (Sup. Ct. N.Y. County 1998), app. dism., 254 A.D.2d 845, 679 N.Y.S.2d 280 (1st Dep't 1998) (citing North Star Reinsurance Corp. v. Continental Ins. Co., 82 N.Y.2d 281, 294, 604 N.Y.S.2d 510, 624 N.E.2d 647 (1993)). Thus, a party that "'has not and will not sustain

any actual out-of pocket loss' as the result of a claim raised against it has no indemnification claim against a third party." Perno 673 N.Y.S.2d at 851 (quoting Pennsylvania General Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465, 470, 510 N.Y.S.2d 67, 502 N.E.2d 982 (1986)). See also Harris v. Standard Accident & Ins. Co., 297 F.2d 627, 635 (2d Cir. 1961), cert. denied, 369 U.S. 843, 7 L. Ed. 2d 847, 82 S. Ct. 875 (1962) ("The New York cases hold that a person secondarily liable for a tort cannot get indemnity from one primarily liable by merely proving that he has suffered an adverse judgment. The contract of indemnity implied by law in favor of one who is legally liable for the negligence of another covers loss or damage, and not mere liability.' Thus, until the judgment is actually paid, there is no damage and no recovery."). Therefore, since Indu Craft has been discharged from its obligation to pay Trendi the judgment entered against it in the bankruptcy proceeding, and Trendi is barred from seeking to enforce that judgment against Indu Craft, Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed.

Indu Craft argues that this case is different because the Plan of Reorganization approved by the Bankruptcy Court contemplated the pursuit of this action. This argument is unavailing. While it is true that Trendi agreed to give up its claim, except to the extent that Indu Craft is successful in recovering in this action, the language of the Plan does not actually bind Indu Craft to pursue this litigation. Moreover, even a clear obligation to pursue the litigation would not create a viable claim where none exists.

In the Perno case, which bears a great deal of similarity to this one, the plaintiff had agreed in the defendant's bankruptcy case that it would "waive distribution on any

claim that [he had] against [defendant], above and beyond what is collected on those claims that [defendant] would be asserting against the [third party defendants]; so that [defendant] would not have to go out of pocket to pay any claim to [plaintiff], only the money that [defendant] would be getting for contribution or indemnification or whatever, from the [third party defendants] . . . would be used to pay that claim." 673 N.Y.S.2d at 851. In that case, plaintiff's attorney said in court, on the record, "we are still prosecuting the claims against the debtor, but would limit collection only to what is indemnified." Id. In that case, the Court then found that the defendant debtor "will never have any claims based in indemnification against any of the doctors against whom it wished to cross-claim." It reasoned that:

Despite the fact that [the plaintiff], in entering into the bankruptcy settlement agreement, retained the right to pursue her action against [defendant] to judgment, and despite the fact that she might conceivably be entitled to a money judgment against [defendant] based on [defendant's] vicarious liability for the torts of one or more of the defendant doctors, [the plaintiff] expressly renounced any right to execute a judgment against [defendant], so as to subject [defendant] to any out-of-pocket loss. Absent any possibility of an out-of-pocket loss, [defendant] can never claim to have sustained any injury for which any other party can be found liable under a theory of indemnification. Consequently, [defendant] may not pursue cross claims against these parties based on indemnification.

Id. (emphasis added).

Given that the Trendi judgment against Indu Craft has not been paid, and cannot be enforced against Indu

Craft, Indu Craft's claim for indemnification against Baroda cannot stand, as a matter of law, and the Fourth Party Complaint must be dismissed.

Indu Craft argues that this conclusion is incorrect, however, because, as the Second Circuit held in Green v. Welsh, 956 F.2d 30, 33-35 (2d Cir. 1992), that pursuant to 11 U.S.C. § 524(e), the relief given by a bankruptcy discharge is not intended to benefit third parties. The Green case, however, and the cases on which Green relied, dealt specifically with plaintiffs who were permitted to proceed against a discharged debtor solely to establish liability, as a prerequisite to recovery, permitted by state law, from an insurer or other surety. See, e.g., In re: Jet Florida Systems, Inc., 883 F.2d 970, 976 (11th Cir. 1989); In re: Walker, 927 F.2d 1138, 1142-44 (10th Cir. 1991). The principal distinction between these cases and Indu Craft's fourth party action is that, as detailed above, New York State law does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss.

Moreover, all of the cases that allow claims to continue against a bankrupt defendant look to several criteria when deciding whether § 524(e) applies to permit an action against a debtor to continue. In In re Catania, 94 B.R. 250, 253 (D. Mass. 1989), the Court set out three criteria to insure that the fresh start objective of the Bankruptcy Code is respected when litigation against the debtor is allowed to continue. It stated that: (1) the plaintiff can maintain the action against the debtor only when it is necessary to establish liability against a third party; (2) the plaintiff can maintain the action against the debtor only if the debtor bears none of the expense of the defense; and (3) most important, the plaintiff may not execute on any judgment he may obtain against the debtor, either against the debtor personally, or against

his assets. Id. at 253 (citing In re White, 73 B.R. 983 (D.D.C. 1987)).

In this case, Indu Craft remains a defendant only to permit entry against it of the judgment entered in the Bankruptcy Court, and to establish Baroda's liability over for the judgment. Nevertheless, Baroda is, as stated above, neither an insurer nor a surety. Its liability to Trendi is not automatically proven by the fact that Indu Craft has consented to entry of a judgment against itself in Trendi's favor.

In addition, in the event that Baroda were held liable to Indu Craft for Trendi's damages, it would be entitled to challenge the amount of Trendi's damages notwithstanding the entry of the judgment for $ 21,101,348.47 in the Bankruptcy Court. First, Baroda is not a party in interest with Indu Craft, against whom principles of collateral estoppel would apply. Quite the contrary, Baroda and Indu Craft's relations have been adversarial throughout the litigation that has taken place over the past fourteen years.

Moreover, even if Baroda could be placed into Indu Craft's shoes, the judgment was entered pursuant to a stipulation in a context in which Indu Craft, which was being released from liability except to the extent that it later collected any payment from Baroda, had no incentive to litigate the amount of damages, and in fact did not challenge them in any way. See Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V., 68 F.3d 1478, 1486 (2d Cir. 1995) ("Collateral estoppel . . . is not to be mechanically applied, for it is capable of producing extraordinarily harsh and unfair results. As an example, a special concern arises if the first determination was made in circumstances where the

losing party had little incentive to litigate the issues fully.").

The second Catania criteria - that the debtor will not bear the expense of the litigation - is discussed at length in many cases, which usually rely in large part on the view that the debtor is unlikely to incur any expenses in defending the suit because the discharge leaves it free to default, compelling the insurer to pay the costs of litigation. Green, 956 F.2d at 34 (citing In re: Jet Florida Systems, Inc., 883 F.2d at 976). See also In re: Holtkamp, 669 F.2d 505, 508-09 (7th Cir. 1982) (decided under 11 U.S.C. § 362(d))("Allowing the civil action to go forward did not jeopardize [the] bankrupt estate because his insurance company assumed full financial responsibility for defending that litigation."). In the Jet Florida case, the Eleventh Circuit expressed its concern that the assets of the debtor not be used to defend such litigation:

We are, however, concerned by the prospect that reversing the decision of the bankruptcy court in this case would frustrate the fresh-start policy embodied in the Code in one way - by requiring the bankrupt to spend sums in defending this lawsuit. We are cognizant that in actions such as these, the cost of litigation can sometimes surpass the actual amount of liability. Therefore, to allow suits of this nature to go forward could possibly have the effect of draining funds that would more properly be used in the revitalization of the reorganized corporation.
883 F.2d at 976.

It then found, however, that given the facts of that case, the practical and economic realities were such that the fresh start policy of the Bankruptcy Code would not be defeated by permitting the action against the debtor in

order to establish the insurer's liability to the plaintiff. Id.

With respect to this concern, however, this case is more like In re: Columbia Gas Transmission Corp., 219 B.R. 716, 720 (S.D.W.Va. 1998), where, pursuant to the contract involved, the excess insurer could not have any liability until after the debtor had paid a $ 250,000 self-insured retention. In that case, the Court held that the fact that the debtor had been discharged from paying its share precluded any claim for the excess coverage. In addition, the Court stated that requiring the debtor to defend against the claims would in itself cause economic loss in violation of the fresh start policy of the Bankruptcy Code. Id., 219 B.R. at 721.

In this case there apparently is an agreement by Tze Wung to fund the litigation against Baroda. However, the extent of this agreement is unclear since the Plan, § 5.2, refers to a "future agreement" and provided that Tze Wung would be repaid prior to distribution of any proceeds realized from the litigation. Notice of Motion, Ex. E at 16. n4 In addition, it is relevant that possibly complex litigation, as explained above, would be required to establish Baroda's liability, and the amount of that liability, on the fourth party claims.

Finally, this case runs afoul of the third Catania requirement. None of the cases that have permitted an action to continue pursuant to § 524(e) have involved situations in which the defendant debtor would be required to make payment on a judgment to the plaintiff before its claim against the third party came into being. This requirement of payment means that the claim asserted against Indu Craft is not merely a "nominal liability", as required by In re: Edgeworth, 993 F.2d 51, 54 (5th Cir. 1993). Thus, New York law to the effect that

a claim for indemnification does not accrue prior to actual payment of a judgment, McDermott v. City of New York, 50 N.Y.2d 211, 216-18, 428 N.Y.S.2d 643, 406 N.E.2d 460 (1980); Bay Ridge Air Rights, Inc. v. New York, 44 N.Y.2d 49, 54, 404 N.Y.S.2d 73, 375 N.E.2d 29 (1978), precludes the continuation of this suit on Trendi's behalf by Indu Craft, which cannot make payment to Trendi in the absence of a prior payment by Baroda. Since § 524(e) does not permit execution against a debtor's assets (and Trendi in any event specifically gave up such a right), maintenance of this action would not be permitted under the third, and most important requirement stated in In re: Catania, 94 B.R. at 253.

III. The RICO Claims

In addition to its claim against Baroda for indemnity, in its First Amended Fourth Party Complaint, Indu Craft alleges claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), (d) ("RICO"). However, to the extent that these claims are asserted by Indu Craft against Baroda for damages to its own business, the facts are the same as those involved in the 1987 Action. In fact, many of the jury's findings in that action are recited in Indu Craft's First Amended Fourth Party Complaint.

In addition, in order to allege a pattern or practice of racketeering activity as defined in 18 U.S.C. § 1961, the First Amended Fourth Party Complaint charges that Baroda engaged in similar extortion of other customers. (First Amended Fourth Party Complaint, PP 79 - 90.) Indu Craft apparently knew of at least some of these activities in 1987 and 1988. (See, e.g., First Amended Fourth Party Complaint, PP 68, 100, 104.) Moreover, the First Amended Fourth Party Complaint states that all of

the acts took place between 1984 and 1990 (see id., PP 118, 120, 140), and makes it apparent that Indu Craft was at least upon inquiry notice as to all of them at the time that the 1987 Action was tried in 1992, although apparently Indu Craft did not attempt to plead a claim under the RICO statute in that case. n5 Thus, the allegations contained in the First Amended Fourth Party Complaint fall within the rule stated by the Second Circuit in the previous appeal in this case: "Upon a final judgment on the merits, parties to a suit are barred as to every matter that was offered and received to sustain or defeat a cause of action, as well as to any other matter that the parties had a full and fair opportunity to offer for that purpose." Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428, 439 (2d Cir. 2000)(quoting Manhattan Eye Ear & Throat Hosp. v. NLRB, 942 F.2d 151, 155-56 (2d Cir. 1991)). See also Churchill v. Star Enterprises, 3 F. Supp. 2d 625 (E.D. Pa. 1998), aff'd, 183 F.3d 184 (3d Cir. 1999)(ADA and PHRA claims were precluded by a previous case in which plaintiff successfully asserted a claim under the FMLA, even though she could not have filed the other claims until after issuance of a right to sue letter).

Presumably to get around the inevitable conclusion that Indu Craft was required to present its RICO claims in the 1987 Action, Indu Craft now attempts to tie those claims to its purported subsequent injury as a result of the entry of judgment against it in the Bankruptcy proceeding. Thus, P 124 of the First Amended Fourth Party Complaint states that:

Indu Craft has been injured in its business or property by reason of Baroda's violation of 18 U.S.C. § 1962(c). As a direct and proximate result of Baroda's violations, Indu Craft has been injured in that, inter alia, it is exposed to civil liability to Trendi for the judgment

obtained against Trendi by BOI and for the judgment Trendi obtained against Indu Craft in Bankruptcy Court.

(See also First Amended Fourth Party Complaint, PP 131, 138, 143, 151.) However, the mere fact that Trendi has now obtained a judgment against Indu Craft, does not create an additional later injury. The injury, if any, took place when Indu Craft was originally "exposed to civil liability" as a result of Trendi's filing its third party complaint herein. Moreover, since all claims against Indu Craft have been discharged, and Trendi has limited its recovery on the judgment to any proceeds realized in this fourth party action, it is difficult to see what RICO damages Indu Craft can claim.

On the other hand, if the facts supporting the RICO claims are not based in the same facts that were involved in the 1987 Action, but were known to Indu Craft in 1990, as apparently they were (see First Amended Fourth Party Complaint, PP 54-109), they are barred by the four year RICO statute of limitations. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987); In re: Merrill Lynch Limited Partnerships Litigation, 154 F.3d 56, 60 (2d Cir. 1998)("This Circuit has adopted an 'injury discovery' rule in RICO cases which holds that 'a plaintiff's action accrues against a defendant for a specific injury on the date that plaintiff discovers or should have discovered that injury.'" (citing Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988), cert. denied, 490 U.S. 1007, 104 L. Ed. 2d 158, 109 S. Ct. 1642 (1989)).

Indu Craft argues that the fact that the third and fourth party actions were stayed between October 5, 1990 and the July 1997 bankruptcy filing tolls the statute of limitations on these claims. However, a stay of an action

does not ordinarily toll the statute of limitations on related claims that are not asserted therein. Cf. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 1723, 44 L. Ed. 2d 295 (1975)(pendency of Title VII proceeding did not toll the statute of limitations with respect to plaintiff's claims pursuant to 42 U.S.C. § 1981); Churchill v. Star Enterprises, 183 F.3d 184, 191 (3rd Cir. 1999) ("Attorneys should organize litigation they are pursuing to avoid claim preclusion."); Abdallah v. City of New York, 2001 U.S. Dist. LEXIS 2616, 95 Civ. 9247 (MGC), 2001 WL 262709 (S.D.N.Y. Mar. 15, 2001); Wood v. McDonald, 1998 U.S. Dist. LEXIS 8486 (N.D. Cal. May 29, 1998), aff'd, 176 F.3d 486 (1999) (a pending adversary proceeding in the Bankruptcy Court did not toll the statute of limitations on a § 1983 claim). Despite the stay, Indu Craft could have sought leave to amend the fourth party complaint, or could have filed a separate action, within the time permitted by the statute of limitations. See Churchill, 3 F. Supp. 2d at 629-30 & n.4 (citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975)). Consequently, Indu Craft's RICO claims must be dismissed as precluded, and/or time-barred under the four year statute of limitations.

IV. Conclusion

For all of the foregoing reasons, Baroda's motion to dismiss the First Amended Fourth Party Complaint is granted, and the First Amended Fourth Party Complaint is dismissed.

SO ORDERED.

Dated: New York, New York
January 17, 2002

John S. Martin, Jr.
U. S. D. J.

Footnotes

n1 Since its discharge in bankruptcy under Chapter 11 of the Bankruptcy Code, Indu Craft's sole shareholder is a Hong Kong corporation called Tze Wung Consultants, Ltd.

n2 Both BOI and Baroda are owned, operated and controlled by the government of India.

n3 This Court has jurisdiction over the fourth party claim pursuant to 28 U.S.C. § 1332(a).

n4 Section 1.37 of the Plan refers to a "New Loan" to the Debtor in the amount of $ 600,000 to be used for the prosecution of post-Effective Date claims, including but not limited to Baroda II. (Notice of Motion, Ex. E at 8.)

n5 There has been no showing that Indu Craft would not have been permitted to present its evidence of similar extortion by Baroda of other customers if it had articulated a RICO claim at that time. In fact, the First Amended Fourth Party Complaint states in P 78(a) that in the trial of the 1987 Action, Anil Chokshi (son of the Executive Vice President of Baroda in charge of North American Operations, and an alleged member of the criminal enterprise alleged in the First Amended Fourth Party Complaint), (First Amended Fourth Party Complaint, PP 43, 127 - 130), invoked the Fifth Amendment to avoid answering questions regarding his receipt of payments from customers of Baroda and other related issues. (See also First Amended Fourth Party Complaint, PP 88, 99-100.) There also is no allegation that Indu Craft did not discover these facts in

a timely manner due to fraudulent concealment, although there are allegations of destruction of documents and tampering with witnesses. (First Amended Fourth Party Complaint, PP 101, 107.) Indu Craft obviously was aware of these matters at the time of the trial of the 1987 Action.

Case No. 97 B 44958 (JHG)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

In re: INDU CRAFT INC.,
Debtor.

September 10,1997

LIMITED OBJECTION TO RELIEF FROM AUTOMATIC STAY AND TO CONVERT TO CHAPTER 7

TO: THE HONORABLE JEFFRY H. GALLET
UNITED STATES BANKRUPTCY JUDGE:

BANK OF BARODA (the "Bank") by and through its undersigned attorneys NIXON, HARGRAVE, DEVANS & DOYLE LLP, as and for its limited objection to an order for relief from the automatic stay and to convert to Chapter 7, as proposed by Eaton & Van Winkle, respectfully represents:

1. The Bank is a creditor and party in interest herein having filed a Proof of Claim in the amount of $27,191.41.

2. The Bank takes no position with respect to the branch of the motion that seeks a conversion of these proceedings to Chapter 7.

3. As for the branch of the motion that seeks a lifting of the stay to permit Magistrate Judge Bernikow to determine the amount of Eaton & Van Winkle's

charging lien, the Bank believes that the relief granted should be more clear the motion contemplates.

4. By way of background, Eaton & Van Winkle applied to Judge Bernikow for an order fixing the amount of its charging lien, but without the Bank (or any other creditor) having access to the underlying fee bills or other supporting documentation. Accordingly, the proceedings before Judge Bernikow did not (and do not) comport with what is required in this Court for the allowance of a claim.

5. In view of the foregoing, the Bank requests that any order entered on the motion: (i) expressly withhold allowance of Eaton & Van Winkle's claim in this Court pending further proceedings, and (ii) preserves the right of the debtor, any trustee, any creditor, and any party in interest to object to to the allowance of Eaton & Van Winkle's claim.

New York, New York
September 5, 1997

NIXON, HARGRAVE, DEVANS & DOYLE LLP

By: Kermit J. Brooks
(KB-3229)

Attorneys for the Bank of Baroda
437 Madison Avenue
New York, New York 10022
Tel. (212) 940-3000

Verdict Sheet

To assist you, you will have a list of questions for each of you to answer. Your decision on each question must be unanimous. The questions must be answered in order.

A. In determining the liability of the Bank to Indu Craft with respect to Indu Craft's first claim for breach of the implied covenant of good faith and fair dealing in the Loan Agreements, you must answer the following questions:

1. On or after March 30, 1987, did the Bank or any of its employees reduce or effectively cancel Indu Craft's line of credit in an unfair manner to avenge Mr. Mehta's refusal to invest in ICCS?

(i) Yes X
(ii) No

If your answer is no, you must proceed no further on this claim and you must enter a -verdict in favor of the Bank. If your answer is yes, then you must proceed to the next question.

2. On or after March 30, 1987, did the Bank reduce or effectively cancel Indu Craft's line of credit in bad faith or unfairly?

(i) Yes X
(ii) No

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank. If your answer is yes, then you must proceed to the next question.

3. On March 30, 1987, was Indu Craft substantially in compliance with the material terms of the loan agreement?

(i) Yes X
(ii) No

If your answer is yes, then you must proceed to the next question, and enter a verdict in favor of the Indu Craft. If your answer is no, then you must: proceed to the next question and enter a verdict in favor of the Bank.

4. On Indu craft's first claim for breach of the implied covenant of good faith and fair dealing in the Loan Agreements, your verdict is:

(i) For Indu Craft X
(ii) For Bank of Baroda

C. If your answer to B6 is for Indu Craft, then you may not answer any questions in this Section C.

In determining the liability of the Bank and Mr. Chokshi to Indu Craft with respect to Indu Craft's claim for prima facie tort, you must answer the following questions:

1. Did the Bank and/or Mr. Chokshi take any action with respect to the Indu Craft account on or after March 30, 1987 for the reason that Mr. Chokshi wanted to avenge Mr. Mehta's rejection of the ICCS business proposal?

(i) Yes X
(ii) No

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question.

2. Were the Bank's and Hr. Chokshi's actions in reducing or cancelling the line of credit and declining to open or amend letters of credit for Indu Craft on or after March 30, 1987 done with malice, that is without any business justification and solely to injure Indu Craft?

(i) Yes X
(ii) No

If your answer is no, you must proceed no further on this claim and you must enter a verdict in favor of the Bank and Mr. Chokshi. If your answer is yes, then you must proceed to the next question.

3. On indu Craft's third claim for prima facie tort against the Bank and Mr. Chokshi, our verdict is:

(i) For Indu Craft X
(ii) For Bank of Baroda and Mr. Chokshi

4. (Only to be answered if your answer to Question No. 3 is for Indu Craft.) We find that Indu Craft may recover special damages in the sum of $1.25 million.

5.2 Class 5 - Subordinated Unsecured Claims.

Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims; (i) two of the three Class 5 claimants, Trendi Sportswear, Inc. ("Trendi") and ANZ Sates, Inc., ("ANZ") shall receive cash, in the amount of $200,000, which Trendi and ANZ shall share pro rata or otherwise agreed between them, and (ii) Trendi, ANZ

and Hemant Mehta, the holders of Claims in Class 5, shall receive their net proceeds of any recovery in Baroda II, as defined in the Plan, after deduction for the reimbursement to Tze Wung Consultants, Ltd. of its funding of the Plan, the funding of the Baroda II litigation pursuant to a future agreement, legal fees, costs and disbursements. The Debtor agrees to consent to judgment being entered against it in the third party action in Baroda 11 for the amount of Trendi's claim as determined by the Bankruptcy Court.

11. Section 5.3 of the Plan is amended to delete the words "Capital Contribution" at the end of the Section, and to replace those words with the word "Loan."

12. Section 7.1 (b) of the Plan is amended to provide that:

(b) On the Effective Date, the Funder shall make the New Capital Loan to the Debtor and the Debtor. The Debtor shall utilize the proceeds of the New Capital Loan for the funding of the payments to creditors and the balance, if any, for the prosecution of Post-Effective Date claims, including but not limited to Baroda II and payment of Allowed Claims in accordance with this Plan.

13. Section 7.4 of the Plan is amended to provide that:

7.4 Funding. (a) Payments and distributions to be made under the Plan to the holders of Administrative Claims, Priority Claims, IRS Claim, EVW Secured Claim, Trustee Fees, and Unsecured Claims shall be made by the Disbursing Agent from (i) the Interpleader Proceeds, (ii) the New Loan and (iii) the proceeds of any claim, right or cause of

Allowed Claim of any Governmental Unit that is obligated to pay such tax refund. In the event a Final Order authorizing such setoff is entered, the funds so reserved shall become Available Cash. In the event a Final Order is entered disallowing such setoff, such funds, together with any interest that may have accumulated thereon, shall be distributed to the holder of the Allowed Claim that had purportedly been subject to such claim of setoff.

ARTICLE 9

DISCHARGE AND RELEASES

9.1 Discharge. (a) On the Effective Date, the Debtor shall be discharged pursuant to section 1141 of the Bankruptcy Code from all Claims against and Interests in the Debtor that arose prior to the Effective Date and from any liability of a kind specified in sections 502(8), 502(h) or 502(i) of the Bankruptcy Code whether (i) a Proof of Claim or Proof of Interest has been fled or deemed to have been filed with respect to such Claim or Interest, (ii) such Claim or Interest is allowed or disallowed, or (iii) the holder of such Claim or Interest has accepted the Plan.

(b) Except as otherwise provided in the Plan, upon the Effective Date, all Persons shall be precluded and enjoined from asserting against the Released Entities and their assets or properties, or against any property that is distributed, or is to be distributed under the Plan, any other or further Claim or Interest based upon any acts or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date.

(c) Except as otherwise provided under the Plan, or a Final Order of the Bankruptcy Court, any judgment at any time obtained, to the extent that such judgment is a determination of the liability of the Debtor with respect to any debt discharged pursuant to the Plan and section 1141(d)(1) of the Bankruptcy Code, shall be null and void and of no force and effect, regardless of whether a Proof of Claim or Proof of Interest therefor was filed or deemed filed and, except as otherwise provided in the Plan, all Creditors holding Claims against the Debtor and holders of Interests in the Debtor shall be precluded from asserting against the Debtor, or any of its assets or properties, any other or further Claims or Interests based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date; and the Confirmation Order shall permanently enjoin all Creditors and holders of Interests, their successors and assigns, from enforcing or seeking to enforce any such Claims or Interests.

9.2 Injunction. Except (i) as otherwise provided in the Plan, (ii) as otherwise provided under Final Order entered by the Bankruptcy Court or (iii) with respect to the Debtor's obligations under the Plan, the entry of the Confirmation Order shall forever stay, restrain and permanently enjoin (i) the commencement or continuation of any action, the employment of process, or any act to collect, enforce, attach, recover or offset from the Debtor or from property of the Debtor, (ii) the creation, perfection or enforcement of any lien or encumbrance against any property

Bk. No. 97-44958 (JHG)
BC No. 00.0517

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: INDU CRAFT INC.,
Debtor.

January 18, 2000

JUDGMENT

ORDERED, ADJUDGED AND DECREED: that Judgment is entered in favor of Trendi Sportswear, Inc. and against Indu Craft, Inc., in tho amount of $21,101,348.47.

Cecella G. Morris
Clerk of the Court

By: Lisa Lee
Deputy Clerk

of Interest is filed and the Disbursing Agent has not received a written notice of a change of address.

10.13 Governing Law. Except to the extent that the Bankruptcy Code or Bankruptcy Rules or other Federal law are applicable, and subject to the provisions of any contract, instrument, release or other agreement or document entered into in connection with the Plan, the rights and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with the laws of the State of New York without giving effect to the principles of conflict of laws thereof.

ARTICLE 11

RETENTION OF JURISDICTION

11.1 Retention of Jurisdiction. Notwithstanding the entry of the Confirmation Order or the occurrence of the Effective Date, the Bankruptcy Court shall retain and have original, but not exclusive, jurisdiction to:

(a) Allow, disallow, determine, liquidate, classify or establish the priority, secured or unsecured status of any Claim or Interest, including, without limitation, the resolution of any request for payment of any Administrative Expense and the resolution of any and all objections to the allowance or priority of Claims or Interests;

(b) Grant or deny any and all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan, for any period ending on or before the Effective Date;

(c) Resolve any motions pending on the Effective Date to assume, assume and assign or reject any executory contract or unexpired lease to which the Debtor is a party or with respect to which the Debtor may be liable and to hear, determine and if necessary, liquidate, any and all Claims arising therefrom;

(d) Ensure that distributions to holders of Allowed Claims and Allowed Interests are accomplished pursuant to the provisions of this Plan;

(e) Decide or otherwise resolve any and all applications, motions, adversary proceedings, contested or litigated matters, and any other matters or grant or deny any applications involving the Debtor that may be pending on the Effective Date;

(f) Enter such Orders as may be necessary or appropriate to implement or consummate the provisions of the Plan and all contracts, instruments, releases and other agreements or documents created in connection with the Plan or Disclosure Statement or to enforce all orders, judgments, injunctions, and rulings entered in connection with the Case;

(g) Resolve any and all controversies, suits or issues that may arise in connection with the consummation, interpretation or enforcement of the Plan or any Entity's obligations incurred in connection with the Plan;

(h) Modify the Plan before or after the Effective Date pursuant to section 1127 of the Bankruptcy Code, or to modify the Disclosure Statement or any contract, instrument, release or other agreement or document created in connection with the Plan or Disclosure Statement;

(i) Remedy any defect or omission or reconcile any inconsistency in any Order, the Plan, the Disclosure Statement or any contract, instrument, release or other agreement or document created in connection with the Plan, to the extent authorized herein or in the Bankruptcy Code;

(j) Issue any injunctions, enter and implement other Orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with consummation or enforcement of the Plan;

(k) Enter and implement such Orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked or vacated;

(l) Determine any dispute arising under or related to the Plan, including, without limitation, any dispute concerning the scope or effect of any release or discharge provided for by the Plan or the Confirmation Order;

(m) Determine any other matters that may arise in connection with or relate to the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release or other agreement or document created in connection with the Plan or Disclosure Statement; and

(n) Adjudicate any application, motion, adversary proceeding or contested matter pending in the Bankruptcy Court on, or initiated following the Effective Date, including, but not limited to, any claims or causes of action brought by the Committee pursuant to section 7.8 of the Plan.

(o) Enter an Order or Final Decree concluding the Case.

Dated: New York, New York
March 24, 1999

INDU CRAFT, INC.

By: Hemant Mehta, its President

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.
Attorneys for the Debtor
1345 Avenue of the Americas
New York, New York 10105

By: A. MITCHELL GREENE
A. Mitchell Greene (AMG-5900)

Index No.
89 CIV. 5996 (JSM)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third Party Plaintiff,

-against-

INDU CRAFT INC.,
Third Party Defendant and Fourth Party Plaintiff,

-against-

BANK OF BARODA,
Fourth Party Defendant

March 29, 2000

Judgment having previously been awarded to the plaintiff Bank of India against defendant Trendi Sportswear, Inc., and the action having been stayed pending the resolution of Indu Craft. Inc, v. Bank of Baroda and Krishnakant C. Chokshi, 87 Civ. 7379 (KTD), and upon such resolution, the Fourth-Party Defendant Bank of Baroda having moved for summary judgment, and the Court having rendered an Opinion and Order, dated September 11, 1998 granting the Fourth-Party Defendant's motion for summary judgment, and the claims in the Third-Party Action between Trendi

Sportswear, Inc. and Indu Craft, Inc. having been resolved by final judgment entered in the United States Bankruptcy Court for the-Southern District of New York in In re Indu Craft. Inc., Case No. 97 B 44958 in favor of Trendi Sportswear, Inc. against Indu Craft, Inc. on January 18, 2000 in the amount of $21,101,348.47, and there being no other claims or defenses to be adjudicated; it is

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order, dated September 11, 1998, Fourth-Party Defendant Bank of Baroda's motion for summary judgment is hereby granted and the Fourth-Party Complaint is dismissed with prejudice.

Dated New York, New York
March 23, 2000

JAMBS M. PARKISON
Clerk of the Court
BY: Deputy Clerk

SO ORDERED

U.S.D.J.
March 24, 2000

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

In re
INDU CRAFT, INC. Taxpayer I.D. No. 13-3048561,
Debtor.

Chapter 11
Case No. 97 B 44958 (JHG)

SECOND AMENDED PLAN OF REORGANIZATION OF INDU CRAFT, INC., AS MODIFIED

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.
Attorneys for the Debtor
1345 Avenue of the Americas
New York, New York 10105-0143
(212) 586-4050

Of Counsel: A. Mitchell Greene, Esq.
Joel M. Shafferman, Esq.

Dated: New York, New York
March 24 1999

The debtor, Indu Craft, Inc. (the "Debtor"), proposes the following plan of reorganization (the "Plan") pursuant to sections 1121(a), 1122 and 1123 of title 11 of the United States Code.

ARTICLE 1 DEFINITIONS

Unless the context otherwise requires (i) the following terms shall have the following meanings when used in this Plan; (ii) any capitalized term that is used in this Plan and not defined in this article 1 but that is defined

in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning set forth therein; (iii) terms stated in the singular shall include the plural and vice versa; (iv) pronouns stated in the masculine, feminine or neuter gender shall include the masculine, the feminine and the neuter, (v) all section, article and exhibit references in the Plan are to the respective section of, article of or exhibit to the Plan; (vi) any reference to a contract, instrument, release or other agreement or document being in a particular form or on particular terms and conditions, means that such document shall be substantially in such form or substantially on such terms and conditions; (vii) any reference to an existing document or exhibit filed or to be filed means such document or exhibit, as it may have been or may be amended, modified or supplemented; (viii) the words "herein", "hereof", "hereto" or "hereunder" and other words of similar import refer to the Plan in its entirety rather than to only a particular portion of the Plan; (ix) the rules of construction set forth in section 102 of the Bankruptcy Code shall govern construction of the Plan; (x) any reference contained herein to the Bankruptcy Code, or to any section of the Bankruptcy Code, refers to the Bankruptcy Code, or such section of the Bankruptcy Code, as it is existing and effective on the Petition Date, except to the extent, if any, that any post-Petition Date amendment to the Bankruptcy Code applies retroactively to cases filed on the Petition Date; and (xi) where appropriate, references to the "Debtor" contained herein shall be deemed to be references to the reorganized debtor following the Confirmation Date.

1.1 "Administrative Bar Date" means the first Business Day that is 60 days after the Effective Date.

1.2 "Administrative Claim" means a Claim for, or request for payment of, an Administrative Expense (i) as

to which no objection to the allowance thereof has been interposed within the applicable period of limitation fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules, or the Bankruptcy Court, or (ii) as to which any objection has been resolved by a Final Order to the extent such objection has been resolved in favor of the holder of such Claim.

1.3 "Administrative Expense" means any cost or expense of administration of this Case, other than Bankruptcy Fees, allowable under section 503(b) of the Bankruptcy Code.

1.4 "Allowed Claim" means a Claim that (a) has not been disallowed pursuant to a Final Order and is not a Disputed Claim and (i) with respect to which a Proof of Claim has been timely filed with the clerk of the Bankruptcy Court or, (ii) if no Proof of Claim was filed, that has been or hereafter is listed by the Debtor in its Schedules as liquidated in amount and not disputed or contingent.

1.5 "Allowed Interest" means an Interest that has not been disallowed and is not a Disputed Interest (i) with respect to which a Proof of Interest was timely filed or, (ii) if no Proof of Interest was filed, that has been or hereafter is listed by the Debtor in its Schedules as liquidated in amount and not disputed or contingent.

1.6 "Bankruptcy Code" means title 11 of the United States Code, as amended from time to time and effective as of the Petition Date.

1.7 "Bankruptcy Court" means the United States Bankruptcy Court for the Southern District of New York or the United States District Court for the Southern District of New York to the extent it withdraws the reference over all or any portion of this Case pursuant to section 157(d) of title 28 of the United States Code.

1.8 "Bankruptcy Fees" mean all fees and charges assessed against the estate under section 1930 of title 28 of the United States Code.

1.9 "Bankruptcy Rules" mean (i) the Federal Rules of Bankruptcy Procedure, and (ii) the Local Bankruptcy Rules for the United States Bankruptcy Court for the District of New York, in either case, as now in effect or hereinafter amended.

1.10 "Bar Date" means any date set by Order of the Bankruptcy Court, subsequent to which a Proof of Claim or Proof of Interest may not be timely filed.

1.11 "Business Day" means any day other than a Saturday, Sunday, or other day on which commercial banks in New York, New York are authorized or required by law to close, or other Legal Holiday.

1.12 "Case" means this case under chapter 11 of the Bankruptcy Code commenced by the Debtor in the Bankruptcy Court on the Petition Date and styled In re Indu Craft, Inc., Case No. 97 B 44958 (JHG).

1.13 "Cash" means lawful currency of the United States of America.

1.14 "Class" means a category of substantially similar Allowed Claims or Allowed Interests.

1.15 "Committee" means any committee appointed in this Case by the United States Trustee for the Southern District of New York pursuant to section 1102 of the Bankruptcy Code.

1.16 "Confirmation" means the entry of the Confirmation Order.

1.17 "Confirmation Date" means the date on which the Confirmation Order is entered by the Bankruptcy Court, provided that the Confirmation Order becomes a Final Order; provided, however, that the Confirmation Order is not stayed by an Order of a court of competent jurisdiction.

1.18 "Confirmation Order" means an Order confirming the Plan pursuant to section 1129 of the Bankruptcy Code.

1.19 "Creditor" means a holder of an Allowed Claim.

1.20 "Debtor" means Indu Craft, Inc., a New York corporation.

1.21 "Deficiency Claim" means, unless the holder thereof elects treatment in accordance with section 1111(b)(2) of the Bankruptcy Code and Bankruptcy Rule 3014, that portion of an Allowed Claim that exceeds the value of all property in which the Estate has an interest that is subject to a Lien securing such Allowed Claim.

1.22 "Disbursing Agent" means the Debtor or its counsel.

1.23 "Disclosure Statement" means the Disclosure Statement for Second Amended Plan of Reorganization for Indu Craft, Inc., including all exhibits, attachments or amendments thereto, approved by Order of the Bankruptcy Court.

1.24 "Disputed Claim" means (a) a Claim that has not been disallowed and with respect to which an objection to the allowance thereof, in whole or in part, has been interposed within the applicable period of limitation fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules or the Bankruptcy Court, to the extent that any such objection has not been resolved by a Final Order; (b) Until the earlier of (i) the filing of an objection to a Proof of Claim or (ii) the last date to file objections to Claims as established by the Plan or by Final Order, a Claim shall be deemed to be a Disputed Claim in its entirety if, (A) the amount specified in the Proof of Claim exceeds the amount of any corresponding Claim listed in the Schedules; (B) any corresponding Claim listed in the Schedules has been scheduled as disputed, contingent or unliquidated; or (C) no corresponding Claim has been listed in the Schedules;

1.25 "Disputed Claim Reserve" means the segregated account or accounts established by the Disbursing Agent pursuant to section 8.7 of the Plan.

1.26 "Disputed Interest" means an Interest in the Debtor that has not been disallowed and with respect to which an objection to the allowance thereof, in whole or in part, has been interposed within the applicable period of limitation fixed by the Plan, the Bankruptcy Code, the Bankruptcy Rules or the Bankruptcy Court, to the extent that any such objection has not been resolved by a Final Order. Until the earlier of (i) the filing of an objection to a Proof of Interest or (ii) the last date to file objections to Interests as established by the Plan or by Final Order, an Interest shall be deemed to be a Disputed Interest in its entirety if, (A) the amount specified in the Proof of Interest exceeds the amount of any corresponding Interest listed in the Schedules; (B) any corresponding Interest listed in the Schedules has been scheduled as disputed, contingent or unliquidated; or (C) no corresponding Interest has been listed in the Schedules.

1.27 "Effective Date" means the first business day that is at least ten Business Days following the Confirmation Date and upon which the Interpleader Proceeds are available for distribution by the Debtor.

1.28 "Estate" means the estate created on the Petition Date as set forth in section 541 of the Bankruptcy Code.

1.29 "EVW Secured Claim" means the Secured Claim held by Eaton & Van Winkle, to the extent, if any, remaining unpaid on the Effective Date.

1.30 "Final Order" means a judgment, order, ruling or other decree issued and entered by the Bankruptcy Court or by any state or other federal court or other tribunal located in one of the states, territories or possessions of the United States or the District of Columbia, that has not been stayed or that is no longer subject to appeal, certiorari proceeding or other

proceeding for review or rehearing, and as to which no appeal, certiorari proceeding, or other proceeding for review or rehearing shall then be pending.

1.31 "Funder" means Tze Wung Consultants, Ltd., a corporation maintaining offices for the conduct of business at Mannlife Towers, 7th Floor, 169 Electric Road, Hong Kong, or its nominee or designee.

1.32 "Interpleader Action" means that certain civil action entitled Bank of Baroda, Plaintiff, -against- Indu Craft, Inc., Eaton & Van Winkle, Bank of India, Hershman & Leicher, P. C., Internal Revenue Service, Department of the Treasury, New York State Department of Taxation and Finance, New York City Department of Finance, 'John Doe and Jane Doe A through Z, " said names being fictitious and unknown to Plaintiff, the persons or parties intended to be those individuals or entities who may claim an interest in the property interpleaded herein, Defendants, case no. 96 Civ. 4420, pending in the United States District Court for the Southern District of New York.

1.33 "Interpleader Proceeds" means the funds deposited with the Clerk of the United States District Court for the Southern District of New York in the Interpleader Action.

1.34 "Interest" means an interest in the Debtor represented by an Equity Security.

1.35 "Interest Holder" means a holder of an Allowed Interest in the Debtor.

1.36 "Legal Holiday" means a Legal Holiday as that term is defined in Bankruptcy
Rule 9006(a).

1.37 "New Loan" means the sum of $600,000 to be lent to the Debtor by Funder on the Effective Date for the prosecution of post-Effective Date claims, including but not limited to an action entitled Bank of India. Plaintiff -against- Trendi Sportswear, Inc.. Defendant. Third Party Plaintiff -against- Indu Craft, Inc.. Third Party Defendant

and Fourth Party Plaintiff. -against- Bank of Baroda Fourth Party Defendant pending in the United States District Court for the Southern District of New York, bearing Index No. 89 C.V.. 5996 (JSM) ("Baroda II").

1.38 "Order" means an order of the Bankruptcy Court.

1.39 "Petition Date" means July 25, 1997, the date on which the Debtor commenced this Case by filing its voluntary petition for relief under chapter I 1 of the Bankruptcy Code.

1.40 "Plan" means this Second Amended Plan of Reorganization for Indu Craft, Inc., As Modified, as it may be further amended, supplemented or modified from time to time, including any exhibits or schedules annexed hereto or required to be filed with the Bankruptcy Court pursuant hereto.

1.41 "Post-Petition Tax Claim" means an Allowed Claim of a Governmental Unit for taxes (or for interest or penalties related to such taxes) for any tax year or period, all or any portion of which occurs or falls within the period from and including the Petition Date through and including the Effective Date.

1.42 "Priority Claim" means an Allowed Claim, other than a Priority Tax Claim, an Administrative Claim, or Bankruptcy Fees, to the extent entitled to priority under section 507 of the Bankruptcy Code.

1.43 "Priority Tax Claim" means an Allowed Claim of a Governmental Unit of the kind specified in section 507(a)(8) of the Bankruptcy Code.

1.44 "Professional" means all professionals employed by the Debtor under section 327 of the Bankruptcy Code.

1.45 "Proof of Administrative Claim" means a request for payment of an Administrative Expense (including fees and expenses allowed under sections 330 or 331 of the Bankruptcy Code of duly retained professionals providing services in this Case) filed pursuant to section 503 of the Bankruptcy Code.

1.46 "Proof of Claim" means a proof of Claim filed pursuant to section 501 of the Bankruptcy Code and Part III of the Bankruptcy Rules.
1.47 "Proof of Interest" means a proof of an Interest filed pursuant to section 501 of the Bankruptcy Code and Part III of the Bankruptcy Rules.
1.48 "Pro Rata" means the proportion an Allowed Claim or an Allowed Interest in a particular Class bears to the aggregate amount of all Allowed Claims or Allowed Interests in such Class.
1.49 "Released Entities" means, individually and collectively, the Debtor, and each of its respective officers, directors, shareholders, agents, employees, representatives, attorneys and other professionals, subsidiaries, and affiliates, and any successor in interest of any of them. 1.50 "Schedules" mean the schedules of assets and liabilities filed by the Debtor with the Bankruptcy Court in accordance with section 521(1) of the Bankruptcy Code and Rule 1007 of the Bankruptcy Rules and any amendments thereto.
1.51 "Secured Claim" means an Allowed Claim, including all amounts, if any, allowed pursuant to section 506(b) of the Bankruptcy Code, to the extent that it is secured by a lien on property in which the Estate has an interest or that is subject to set-off under section 553 of the Bankruptcy Code, to the extent of the value of the Claim holder's interest in the Estate's interest in such property or to the extent of the amount subject to set-off, as applicable, as determined pursuant to section 506(a) of the Bankruptcy Code.
1.52 "Unsecured Claim" means an Allowed Claim, including a Deficiency Claim, that is not an Administrative Claim, a Bankruptcy Fee, a Priority Claim, a Priority Tax Claim, a Secured Claim.

ARTICLE 2

TREATMENT OF UNCLASSIFIED CLAIMS

Pursuant to section 1123(a)(1) of the Bankruptcy Code, the Plan does not classify dministrative Claims or Allowed Priority Tax Claims. Such Claims, to the extent Allowed, shall receive the treatment provided in this Article 2 in full settlement, release and discharge thereof.

2.1 Administrative Bar Date. Except as otherwise provided in sections 2.2, and 2.3 of the Plan, Proofs of Administrative Claims must be filed no later than the Administrative Bar Date. Holders of Administrative Claims that do not file Proofs of Administrative Claims on or before the Administrative Bar Date, shall be forever barred from asserting such Claims against the Debtor or its property.

2.2 Professionals' Compensation and Reimbursement. (a) All Professionals shall file final applications for approval of compensation and reimbursement of reasonable and necessary expenses pursuant to section 330 of the Bankruptcy Code no later than the Administrative Bar Date. Any such application timely filed shall be deemed to be a Proof of Administrative Claim. Objections to any Professional's application for compensation or reimbursement must be filed and served upon such Professional, and the Disbursing Agent, no later than 30 days after service of such Application. Any such objection not timely filed and served shall be deemed to have been waived.

(b) No later than three days prior to the Effective Date, each such Professional shall provide the Debtor with an estimate of the total amount of compensation and expenses for which such Professional expects to seek final compensation pursuant to section 330 of the Bankruptcy Code, including, but not limited to, estimated sums for the preparation and prosecution of

any such application. On the Effective Date the Debtor shall segregate sufficient Cash to pay all such estimated compensation and expenses in full; provided, however, that the failure of a Professional to provide the Debtor with an estimate of its compensation and expenses shall only serve to limit the amount of Cash segregated by the Debtor with respect thereto and shall not prejudice the determination of any application filed by such Professional in accordance with section 2.2 of the Plan.

2.3 Post-Petition Tax Claims. All Proofs of Administrative Claims for PostPetition Tax Claims for which no bar date has otherwise previously been established, must be filed on or before the later of (i) 60 days following the Effective Date; and (ii) 120 days following the filing of the tax return for such taxes for such tax year or period with the applicable Governmental Unit. Any holder of any Post-Petition Tax Claim that does not file a Proof of Administrative Claim by the applicable bar date shall be forever barred from asserting any such Post-Petition Tax Claim against the Debtor or its property, whether any such Post-Petition Tax Claim is deemed to arise prior to, on, or subsequent to the Effective Date.

2.4 Administrative Claims. Each Administrative Claim, to the extent not previously paid, shall be paid by the Disbursing Agent, in Cash, in full on (i) the later of the Effective Date, the date payment of such Claim is due under the terms thereof or applicable law, or three business days after such Claim becomes an Administrative Claim or (ii) as may be otherwise mutually agreed in writing between the Disbursing Agent and the holder of such Claim; provided, however, that any Administrative Claim incurred by the Debtor in the ordinary course of its business shall be paid in full or performed by the Debtor in accordance with the terms and conditions of the particular transaction giving rise

to such Administrative Claim and any agreements relating thereto.

2.5 Priority Tax Claims. Subject to the provisions of Article 8 of the Plan, all Allowed Claims of Governmental Units entitled to priority pursuant to section 507(a)(8) of the Bankruptcy Code, shall be paid, in Cash, in full on the Effective Date.

2.6 Bankruptcy Fees. All fees and charges assessed against the Debtor under section 1930 of title 28 of the United States Code shall be paid, in Cash, in full on or before the Effective Date.

ARTICLE 3 CLASSIFICATION OF CLAIMS AND INTERESTS

Except as otherwise provided in article 2, Allowed Claims and Allowed Interests are classified as set forth in this article 3. A Claim or Interest is in a particular Class designated herein only to the extent such Claim or Interest (i) fits within the description of such Class and is in such other and different Class or Classes to the extent that the remainder thereof fits within the description of such other Class or Classes and (ii) has not been paid, released or otherwise satisfied prior to the Effective Date.

3.1 Class I - EVW Secured Claim. Class 1 consists of the EVW Secured Claim, if any.

3.2 Class 2 - IRS Secured Claim. Class 2 consists of the IRS Secured Claim.

3.3 Class 3 - Unsecured Claims. Class 3 consists of all Unsecured Claims.

3.4 Class 4 - Tze Wung Secured Claim. Class 4 consists of the Tze Wung Secured Claim.

3.5 Class 5 - Subordinated Claims. Class 5 consists of Subordinated Claims.

3.6 Class 6 - Allowed Interests. Class 6 consists of all Allowed Interests.

ARTICLE 4
TREATMENT OF UNIMPAIRED CLAIMS AND INTERESTS

4.1 Class 1 - EVW Secured Claim. In full satisfaction of the EVW Secured Claim against the Debtor, if any, EVW shall receive the treatment accorded to it under the Stipulation and Consent Order Resolving Claims of Eaton & VanWinkle and Providing Relief from the Automatic Stay, a copy of which is annexed hereto as Exhibit "A" and the terms of which are incorporated by reference herein

4.2 Class 2 - IRS Secured Claim. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, in full satisfaction of the IRS Secured Claim against the Debtor, i f any, the IRS shall receive payment in cash, in the amount of one hundred (100%) percent of its Allowed Secured Claim.

4.3 Class 3 - Unsecured Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of Administrative Claims, Priority Claims, and Trustee Fees, if any, each holder of an Allowed Unsecured Claim shall be paid, in cash, in full on the Effective Date.

ARTICLE 5 TREATMENT OF IMPAIRED CLAIMS

Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan in full settlement, release and discharge thereof.

5.1 Class 4 -Tze Wung Secured Claim.

(a) The Tze Wung Secured Claim shall be an Allowed Claim, in the amount of $1,820,000, for the reimbursement of monies loaned to the Debtor for legal fees and expenses incurred in connection with litigation which resulted in the issuance of a judgment against Bank of Baroda in the Debtor's Favor, in the amount of $2,519,822.29, on July 31, 1996;

(b) On the Effective Date Tze Wung shall receive payment, in cash, in the amount of $620,000;

(c) On the Effective Date, Tze Wung shall issue to the Debtor the New Loan, in the sum of $600,000. As security for the New Loan, the Debtor will provide Tze Wung with a promissory note and security interest in all of the Debtor's tangible and intangible property, wherever located, including but not limited to, the proceeds generated from Baroda 11 or any other claim or cause of action of the Debtor;

(d) For repayment of the New Loan, Tze Wung shall receive the fast proceeds, in the amount of $600,000, generated by the successful prosecution or settlement of Baroda 11 or any other claim or cause of action of the Debtor;

(e) The Debtor shall not be obligated to repay any of the New Loan for the first twelve (12) months of the term of the New Loan. Thereafter, commencing on the thirteenth (13th) month of the term of the New Loan, the New Loan shall bear interest at the rate of nine (9%) percent per annum, and interest shall be payable monthly; and

(f) The Debtor shall be obligated to reimburse Tze Wung for any legal fees and costs it incurs in enforcing the teens of this Section 5.1 of the Plan and the promissory note described in this Section 5.1 of the Plan.

5.2 Class 5 -Subordinated Unsecured Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims; (i) two of the three Class 5 claimants,

Trendi Sportswear, Inc. ("Trendi") and ANZ Sales, Inc., ("ANZ") shall receive cash, in the amount of $300,000, which Trendi and ANZ shall share pro rata or otherwise agreed between them, and (ii) Trendi, ANZ and Hemant Mehta, the holders of Claims in Class 5, shall receive their net proceeds of any recovery in Baroda 11, as defined in the Plan, after deduction for the reimbursement to Tze Wung Consultants, Ltd. of its funding of the Plan, the funding of the Baroda II litigation pursuant to a future agreement, legal fees, costs and disbursements.

5.3 Class 6 - Allowed Interests. On the Effective Date, each Interest Holder shall retain its respective Allowed Interest in the Debtor in return for the New Loan.

ARTICLE 6
TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.1 Rejection of Executory Contracts and Unexpired Leases. On the Effective Date, all executory contracts and unexpired leases to which the Debtor is a party, shall be deemed rejected in accordance with section 365 of the Bankruptcy Code.

6.2 Rejection Claims. Allowed Claims arising from the rejection of any executory contract or unexpired lease of the Debtor shall be treated as Class 3 Unsecured Claims.

6.3 Bar to Rejection Claims. A Proof of Claim with respect to any Unsecured Claim for damages arising from the rejection of an executory contract or unexpired lease shall not be timely filed unless it is filed with the Bankruptcy Court and served so that it is received by counsel for the Debtor within 30 days after the earlier of (i) the date of entry of a Final Order approving such rejection (unless such Final Order expressly provides a Bar Date with respect to such

Claim, in which event no Proof of Claim with respect to such Claim shall be deemed timely unless it is filed with the Bankruptcy Court and served in the manner provided in such Final Order), or (ii) the Confirmation Date. Any such Claim not timely filed and served shall be forever barred from assertion and may not be enforced against the Debtor or its property.

ARTICLE 7 IMPLEMENTATION OF THE PLAN

7.1 Implementation. (a) The Debtor shall take all necessary steps, and perform all necessary acts, to consummate the terms and conditions of the Plan. The Confirmation Order shall contain appropriate provisions, consistent with section 1142 of the Bankruptcy Code, directing the Debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property required by the Plan and to perform any act, including the satisfaction of any lien, that is necessary for the consummation of the Plan.
(b) On the Effective Date, the Funder shall make the New Capital Loan to the Debtor and the Debtor. The Debtor shall utilize the proceeds of the New Capital Loan to for the prosecution of Post-Effective Date claims, including but not limited to Baroda 11 and payment of Allowed Claims in accordance with this Plan.

7.2 Continued Corporate Existence of the Debtor. Except as otherwise provided herein, the Debtor, shall continue to exist after the Effective Date as a separate corporate entity in accordance with the laws of the State of New York.
7.3 Amended Charter. On the Effective Date, the Debtor shall file an amended charter with the State of New York evidencing (i) compliance with section

1123(a)(6) of the Bankruptcy Code, and (ii) containing such provisions as are necessary to effectuate the Plan.

7.4 Funding. (a) Payments and distributions to be made under the Plan to the holders of Administrative Claims, Priority Claims, IRS Claim, EVW Secured Claim, Trustee Fees, and Unsecured Claims shall be made by the Disbursing Agent from (i) the Interpleader Proceeds, (ii) the New Loan and (iii) the proceeds of any claim, right or cause of action belonging to the Debtor and prosecuted pursuant to section 7.8 of the Plan.

(b) To the extent permitted by applicable law, tax obligations incurred by the reorganized Debtor shall be satisfied by the Debtor's net operating loss.

7.5 Transfer Taxes. Pursuant to section 1146 of the Bankruptcy Code, the initial issuance, transfer, or exchange of any security and the making or delivery of any instrument of transfer in connection with or in furtherance of the Plan (including any instrument executed in furtherance of the transactions contemplated by articles 5 and 7 of the Plan) shall not be subject to tax under any law imposing a stamp tax, real estate Transfer Tax, mortgage recording tax or similar tax, and, to the extent provided by section 1146, if any, shall not be subject to any state, local or federal law imposing sales tax.

7.6 Execution of Documents. Pursuant to sections 105, 1141 (c) and 1142(b) of the Bankruptcy Code, the Debtor and the Disbursing Agent shall be authorized to execute, in the name of any necessary party, any notice of satisfaction, release or discharge of any Lien, Claim or encumbrance not expressly preserved in the Plan and deliver such notices to any and all federal, state and local governmental agencies or departments for filing and recordation, and the Confirmation Order shall expressly so provide.

7.7 Filing of Documents. Pursuant to sections 105, 1141(c) and 1142(b) of the Bankruptcy Code, each and every federal, state and local governmental agency or department, shall be directed to accept and record any and all documents and instruments necessary, useful or appropriate to effectuate, implement and consummate the transactions contemplated by the Plan, and any and all notices of satisfaction, release or discharge or assignment of any Lien, Claim or encumbrance not expressly preserved by the Plan.

7.8 Preservation of Rights of Action. Except as otherwise provided herein or in any contract, instrument, release or other agreement entered into in connection with the Plan, the Debtor shall retain, and may enforce any claims, rights and causes of action arising under sections 544 through 550 of the Bankruptcy Code or any similar provisions of state law, or any other statute or legal theory. Any recovery received by the Debtor through the prosecution, settlement or collection of any such claim, right or cause of action, shall be distributed on a Pro Rata basis, first, on account of Priority Claims, in their respective order of priority, second, on account of Unsecured Claims, until all such claims are paid in full. Any balance remaining after the satisfaction of such claims shall be retained by the Debtor.

7.9 Interpleader Action. (a) In accordance with sections 1141 and 1142 of the Bankruptcy Code, the entry of the Confirmation Order shall terminate the Interpleader Action and shall discharge the Debtor from all claims filed in the Interpleader Action; provided, however, that any Claim that was raised in the Interpleader Action and that constitutes an Allowed Claim against the Debtor shall receive the treatment provided for such Allowed Claim under the Plan.

(b) Upon the entry of the Confirmation Order, and in accordance with the provisions of section 543 of the

Bankruptcy Code, the Clerk of the United States District Court for the Southern District of New York shall deliver the Interpleader Proceeds to the extent, if any, not previously delivered, to the Disbursing Agent for distribution in accordance with the terms of the Plan, and the Confirmation Order shall expressly so provide.

(c) Upon the entry of the Confirmation Order, and the delivery of the Interpleader Proceeds to the Disbursing Agent in accordance with section 7.9(b) of the Plan, the Debtor shall submit an order to the United States District Court for the Southern District of New York, dismissing the Interpleader Action with prejudice, and the Confirmation Order shall expressly so provide.

ARTICLE 8
PROVISIONS GOVERNING DISTRIBUTIONS

8.1 Disbursing Agent. The Disbursing Agent shall distribute all Cash or other property to be distributed under the Plan. The Disbursing Agent may employ or contract with other entities to assist in or perform the distribution of the property to be distributed. The Disbursing Agent shall serve subject to the provision of a bond in the amount established by the Court at Confirmation. The Disbursing Agent may liquidate any non-cash assets it receives.

8.2 Timing of Distributions Under the Plan. Subject to section 8.6 of the Plan, any payments, distributions or other performance to be made pursuant to the Plan on account of any Claim or Interest shall be deemed to be timely made if made on or within five Business Days following the later of (i) the Effective Date or (ii) the expiration of any applicable objection deadline with respect to such Claim or Interest or (iii) such other times provided in the Plan.

8.3 Method of Payment. Unless otherwise expressly agreed, in writing, all Cash payments to be made pursuant to the Plan shall be made by check drawn on a domestic bank.

8.4 Objection Deadline. Unless otherwise ordered by the Bankruptcy Court, any party in interest may object to the allowance of any Claim or Interest filed with the Bankruptcy Court in whole or in part by serving and filing an objection to such Claim or Interest no later than the Confirmation Date; provided, however, that the Debtor or the Disbursing Agent may file and serve any objection to any Claim or Interest at any time, but in no event after the later to occur of (i) 180 days after the Effective Date or (ii) 180 days after the date proof of such Claim or Interest is filed.

8.5 Prosecution of Objections. After the Confumation Date, only the Disbursing Agent shall have authority to file, settle, compromise, withdraw or litigate to judgment objections to Disputed Claims. The Disbursing Agent shall have the right to litigate to judgment, settle or withdraw any objection to any Claim or Interest.

8.6 No Distribution Pending Allowance. Notwithstanding any other provision of the Plan, no payment or distribution of Cash or other property shall be made with respect to any portion of a Disputed Claim unless and until all objections to such Claim are resolved by Final Order.

8.7 Escrow of Cash Distributions. (a) On the Effective Date, the Disbursing Agent shall deposit in one or more segregated accounts, Cash or property equal to 100% of the Cash or property to be distributed under the Plan on account of Disputed Claims that would be Allowed Claims but for the pendency of a dispute with respect thereto, including, but not limited to (i) Disputed Claims entitled to treatment as administrative expenses or as priority claims pursuant to sections 503 and 507 of the Bankruptcy Code, (ii) claims of

governmental units for any tax, (iii) the IRS Claim, and (iv) any amount due but not payable on the Effective Date on account of administrative expenses or claims entitled to priority pursuant to section 503 and 507 of the Bankruptcy Code). The Disbursing Agent shall also segregate any interest, dividends or proceeds of such Cash. Such Cash together with any interest, dividends or proceeds thereof, shall be held in trust for the benefit of the holders of all such Disputed Claims pending determination of their entitlement thereto.

(b) In determining the amount of the Cash or property to be distributed under the Plan on account of Disputed Claims, the calculation of the distribution to each holder of an Allowed Claim in such class shall be made as if all Disputed Claims in the applicable class were Allowed Claims in their respective face amounts.

(c) The Disbursing Agent shall have the right to seek an Order of the Bankruptcy Court, after notice and a hearing, estimating or limiting the amount of Cash or property that must be so deposited. Any Creditor whose Claim is so estimated shall have no recourse to any assets theretofore distributed on account of any Allowed Claim, or any other Entity or property if the Allowed Claim of that Creditor as determined by Final Order exceeds the amount so deposited. Instead, such Creditor shall have recourse only to the undistributed assets in the Disputed Claims reserve (on a Pro Rata basis with other Creditors of the same Class who are similarly situated) that exceed the aggregate amount of all Disputed Claims allowed by Final Order.

8.8 Distribution After Allowance. Within 30 days afler the end of each calendar quarter following the Effective Date, the Disbursing Agent shall distribute all Cash or other property, including any interest, dividends or proceeds thereof, to which a holder is then entitled with respect to any Disputed Claim that has become an Allowed Claim during the preceding quarter.

8.9 Investment of Segregated Cash and Property. To the extent practicable, the Disbursing Agent may invest any Cash or other property segregated on account of a Disputed Claim, Disputed Interest, undeliverable distribution, or any proceeds thereof (i) in a manner that will yield a reasonable net return taking into account the safety of the investment or (ii) in any manner permitted by section 345 of the Bankruptcy Code.

8.10 Distribution After Disallowance. Subject to section 8.7(c) of the Plan, the Cash and other property segregated on account of Disputed Claims, including the allocable portion of the net return yielded from any investment thereof remaining after all Disputed Claims have been resolved shall be retained by the Disbursing Agent and (i) used to pay Post-Confirmation Administrative Claims, if any, and then (ii) distributed pro rata, first to the holders of Priority Claims in accordance with their respective priorities, and second to the holders of Unsecured Claims, and third, the remainder, if any, to the Interest Holders.

8.11 Surrender of Instruments. (a) Notwithstanding any other provision of the Plan, no Creditor that holds a note or other instrument evidencing such Creditor's Claim may receive any distribution with respect to such Claim unless and until the original note or other original instrument evidencing such Claim shall have been validly surrendered to the Disbursing Agent at the sole cost and expense of such Creditor_ In addition, at the election of the Disbursing Agent, a Creditor that holds a mortgage, security interest, assignment of rents or other such instrument shall execute and deliver to the Disbursing Agent an assignment or satisfaction of such mortgage, security interest, assignment of rents or other such instrument, in proper form for recording. Any Cash or property to be distributed pursuant to the Plan on account of any such Claim shall, pending surrender, be

treated as an undeliverable distribution pursuant to section 8.13 of the Plan.

(b) In the event any Creditor is unable to surrender a Note or other instrument evidencing a Claim against the Debtor that has been destroyed, lost or stolen, such Entity may receive a distribution with respect to such Claim by presenting to the Disbursing Agent, in a form acceptable to the Disbursing Agent: (i) proof of such Entity's title to such Claim; (ii) proof of the loss, destruction, mutilation or theft of such Note or other instrument evidencing a Claim; (iii) an affidavit to the effect that the same has been lost and after diligent search cannot be located; and (iv) such indemnification as may be required by the Disbursing Agent and all other Entities deemed appropriate by the Disbursing Agent from any loss, action, suit or any claim whatsoever which may be made as a result of such Entity's receipt of a distribution under the Plan.

(c) All questions as to the validity, form or eligibility of any Note or other instrument evidencing a Claim so surrendered shall be resolved by Final Order of the Bankruptcy Court. Neither the Debtor nor the Disbursing Agent shall be under any duty to give notification of defects in such tender or shall incur liability for failure to give notification of such defects. Any such Note or instrument received by the Disbursing Agent that is not properly tendered and to which the defects have not been cured or waived, will be returned by the Disbursing Agent to the tendering holder as soon as practicable.

8.12 Delivery of Distributions. Except as provided in sections 8.13 and 8.14 of the Plan, distributions to holders of Allowed Claims and Allowed Interests shall be made: (1) at the addresses set forth on the respective Proofs of Claim or Proofs of Interests Filed by such holders; (2) at the addresses set forth in any written notices of address changes delivered to the Disbursing

Agent after the date of any related Proof of Claim; or (3) at the address reflected in the Schedules if no Proof of Claim or Proof of Interest is filed and the Disbursing Agent has not received a written notice of a change of address.

8.13 Undeliverable Distributions. (a) If the distribution to the holder of any Claim or Interest is returned to the Disbursing Agent as undeliverable, no further distribution shall be made to such holder unless and until the Disbursing Agent is notified in writing of such holder's then current address. Undeliverable distributions shall remain in the possession of the Disbursing Agent until the earlier of (i) such time as a distribution becomes deliverable or (ii) such undeliverable distribution becomes an unclaimed distribution pursuant to section 8.14 of the Plan.

(b) Until such time as an undeliverable distribution becomes an unclaimed distribution pursuant to section 8.14 of the Plan, within 30 days after the end of each calendar quarter following the Effective Date, the Disbursing Agent shall make distributions of all Cash and property that has become deliverable during the preceding quarter. Each such distribution shall include the net return yielded from the investment of any undeliverable Cash, from the date such distribution would have been due had it then been deliverable to the date that such distribution becomes deliverable.

(c) Nothing contained in the Plan shall require the Debtor or the Disbursing Agent to attempt to locate any holder or an Allowed Claim of an Allowed Interest.

8.14 Unclaimed Distributions. Any Cash or other property to be distributed under the Plan not claimed by the Entity entitled thereto before the later of (i) 3 years after the Effective Date or (ii) 60 days after an Order allowing the Claim of that Entity becomes a Final Order, shall be deemed to be Available Cash and shall be (i) used to pay Post-Confirmation Administrative Claims, if

any, and then (ii) distributed pro rata, first to the holders of Priority Claims in accordance with their respective priorities, and second to the holders of Unsecured Claims, and third, to the Interest Holders.

8.15 Set-offs. The Disbursing Agent may, but shall not be required to set-off against the distributions to be made pursuant to the Plan, the claims, obligations, rights, causes of action and liabilities of any nature that the Debtor may hold against the holder of an Allowed Claim, provided, however, that neither the failure to effect such a set-off nor the allowance of any claim hereunder shall constitute a waiver or release by the Debtor or the Disbursing Agent of any such claims, obligations, rights, causes of action and liabilities that the Debtor or the Disbursing Agent has or may have against such holder, provided further, however, that the Disbursing Agent shall reserve an amount equal to any such setoff with respect to any claim of the Debtor against the holder of an allowed claim in a segregated account pending the entry of a Final Order determining the validity of such setoff, and provided further, however, that in any event the Disbursing Agent shall setoff the amount of any tax refund which the Debtor is entitled to receive against the amount of the Allowed Claim of any Governmental Unit that is obligated to pay such tax refund. In the event a Final Order authorizing such setoff is entered, the funds so reserved shall become Available Cash. In the event a Final Order is entered disallowing such setoff, such funds, together with any interest that may have accumulated thereon, shall be distributed to the holder of the Allowed Claim that had purportedly been subject to such claim of setoff.

ARTICLE 9 DISCHARGE AND RELEASES

9.1 Discharge. (a) On the Effective Date, the Debtor shall be discharged pursuant to section 1141 of the Bankruptcy Code from all Claims against and Interests in the Debtor that arose prior to the Effective Date and from any liability of a kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code whether (i) a Proof of Claim or Proof of Interest has been filed or deemed to have been filed with respect to such Claim or Interest, (ii) such Claim or Interest is allowed or disallowed, or (iii) the holder of such Claim or Interest has accepted the Plan.

(b) Except as otherwise provided in the Plan, upon the Effective Date, all Persons shall be precluded and enjoined from asserting against the Released Entities and their assets or properties, or against any property that is distributed, or is to be distributed under the Plan, any other or further Claim or Interest based upon any acts or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date.

(c) Except as otherwise provided under the Plan, or a Final Order of the Bankruptcy Court, any judgment at any time obtained, to the extent that such judgment is a determination of the liability of the Debtor with respect to any debt discharged pursuant to the Plan and section 1141(d)(1) of the Bankruptcy Code, shall be null and void and of no force and effect, regardless of whether a Proof of Claim or Proof of Interest therefor was filed or deemed filed and, except as otherwise provided in the Plan, all Creditors holding Claims against the Debtor and holders of Interests in the Debtor shall be precluded from asserting against the Debtor, or any of its assets or properties, any other or further Claims or Interests based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date, and the Confirmation Order shall permanently enjoin all Creditors and holders of

Interests, their successors and assigns, from enforcing or seeking to enforce any such Claims or Interests.

9.2 Injunction. Except (1) as otherwise provided in the Plan, (ii) as otherwise provided under Final Order entered by the Bankruptcy Court or (iii) with respect to the Debtor's obligations under the Plan, the entry of the Confirmation Order shall forever stay, restrain and permanently enjoin (i) the commencement or continuation of any action, the employment of process, or any act to collect, enforce, attach, recover or offset from the Debtor or from property of the Debtor, (ii) the creation, perfection or enforcement of any lien or encumbrance against any property of the Debtor or any property distributed under the Plan, or (iii) any Claim or Interest discharged under the Confirmation Order, the Plan or pursuant to section 1141(d)(1) of the Bankruptcy Code.

9.3 Limitation of Liability. Neither the Debtor, nor any of its officers, directors, or employees (acting in such capacity) nor any professional person employed by any of them, shall have or incur any liability to any entity for any action taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, Confirmation or consummation of the Plan, the Disclosure Statement or any contract, instrument, release or other agreement or document created or entered into, or any other action taken or omitted to be taken in connection with the Case or the Plan.

9.4 Released Entities. Except as otherwise expressly set forth in the Plan, upon the Effective Date, in consideration of the Cash and other property to be distributed to or on behalf of the holders of Claims under the Plan, the Plan shall be deemed to resolve all disputes and constitute a settlement and release, between and among the Debtor and its partners, officers, directors, agents, representatives and

employees, and shall constitute a release of the Released Entities, effective as of the Effective Date, by the Debtor, on its own behalf and on behalf of all Interest Holders and Creditors, and by each Creditor and Interest Holder on their own behalf, from any claim or liability, whether legal, equitable, contractual, secured, unsecured, liquidated, unliquidated, disputed, undisputed, matured, unmatured, fixed or contingent, known or unknown, that the Debtor, its Creditors or Interest Holders ever had, now have or hereafter may have (including, without limitation, any claims the Debtor may assert on its own behalf or on behalf of Creditors or Interest Holders pursuant to sections 510 and 542 through 553 of the Bankruptcy Code, any claims Creditors or Interest Holders may have asserted derivatively on behalf of the Debtor absent bankruptcy) based on the conduct of the Debtor's business affairs prior or subsequent to the commencement of the Case (but not subsequent to the Effective Date) or any claims based on the negotiation, submission and confirmation of the Plan.

9.5 Plan and Confirmation Order as Release. From and after the Effective Date, a copy of the Confirmation Order and the Plan shall constitute and may be submitted as a complete defense to any claim or liability released pursuant to this article 9 of the Plan.

ARTICLE 10 MISCELLANEOUS PROVISIONS

10.1 Orders in Aid of Consummation. Pursuant to sections 105, 1141, 1142 and 1 143 of the Bankruptcy Code, the Bankruptcy Court may enter one or more Orders in aid of Confirmation directing the implementation of matters or actions required by the Plan.

10.2 Dissolution of Committees. The Committee, if any, shall be dissolved and disbanded effective as of the Effective Date.

10.3 Compliance with Tax Requirements. In connection with the Plan, the Debtor and, where applicable the Disbursing Agent, shall comply with all withholding and reporting requirements imposed by federal, state and local taxing authorities and distributions under the Plan with respect to the activities of the Disbursing Agent and shall be subject to applicable withholding and reporting requirements; providing, however, that the transfer of any Cash, property or other interest hereunder shall not be subject to any federal, state or local tax to the fullest extent provided under section 1146 of the Bankruptcy Code.

10.4 Due Authorization by Creditors. Each and every Creditor who elects to participate in the distributions provided for under the Plan warrants that it is the lawful owner of such Claim and is authorized to accept the distributions provided for in the Plan and that there are no outstanding Liens, encumbrances, commitments, agreements, or understandings, express or implied, that may or can in any way defeat or modify the rights released, conveyed or modified by the Plan, or obligations undertaken by such Creditor under the Plan.

10.5 Amendments. The Plan may be altered, amended or modified by the Debtor, in writing, signed by the Debtor at any time before the substantial consummation of the Plan, as provided in sections 1101 (a) and 1127 of the Bankruptcy Code and Bankruptcy Rule 3019.

10.6 Revocation. The Debtor may revoke or withdraw the Plan at any time prior to entry of the Confirmation Order. If the Plan is revoked or withdrawn or if no Confirmation Order is entered, the Plan shall be null and void, and nothing contained in the Plan shall (i) constitute a waiver or release of any Claims by or against, or any Interest in, the Debtor, or (ii) prejudice in

any manner the rights of the Debtor in any further proceedings involving the Debtor.

10.7 Request for Relief Under Section 1129(b). In the event that the Plan is accepted by one or more, but not all impaired Classes of Creditors, the Debtor requests confirmation under section 1129(b) of the Bankruptcy Code, subject to any modification of the Plan made pursuant to section 1127 of the Bankruptcy Code, Bankruptcy Rule 3019 and section 12.5 of the Plan.

10.8 Filing of Additional Documents. Except as otherwise provided in the Plan, on or before the Effective Date, the Debtor may file with the Court such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan.

10.9 Section Headings. The section headings contained in the Plan are for reference purposes only and shall not affect in any way the meaning or interpretation of the Plan. 10.10 Computation of Time. In computing any period of time prescribed or allowed by the Plan, the provisions of Bankruptcy Rule 9006(a) shall apply.

10.11 Successors and Assigns. The rights, benefits and obligations of any entity named or referred to in the Plan shall be binding on, and shall inure to the benefit of, any heir, executor, administrator, successor or assign of such entity.

10.12 Notices. All notices and other communications to be given or made hereunder shall be in writing and shall be deemed to have been given or made when mailed or as otherwise set forth herein:

(a) if to the Debtor at (i) Indu Craft, Inc., c/o Robinson Brog Leinwand Greene Genovese & Gluck, P.C., 1345 Avenue of the Americas, New York, New York 10105, Attn: A. Mitchell Greene, Esq.;

(b) if to any Creditor or Interest holder at (i) the addresses set forth on the respective Proofs of Claim or

Proofs of Interests Filed by such holders; (ii) the addresses set forth in any written notices of address changes delivered to the Disbursing Agent after the date of any related Proof of Claim; or (iii) the address reflected in the Schedules if no Proof of Claim or Proof of Interest is filed and the Disbursing Agent has not received a written notice of a change of address.

10.13 Governing Law. Except to the extent that the Bankruptcy Code or Bankruptcy Rules or other Federal law are applicable, and subject to the provisions of any contract, instrument, release or other agreement or document entered into in connection with the Plan, the rights and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with the laws of the State of New York without giving effect to the principles of conflict of laws thereof.

ARTICLE 11
RETENTION OF JURISDICTION

11.1 Retention of Jurisdiction. Notwithstanding the entry of the Confirmation Order or the occurrence of the Effective Date, the Bankruptcy Court shall retain and have original, but not exclusive, jurisdiction to:

(a) Allow, disallow, determine, liquidate, classify or establish the priority, secured or unsecured status of any Claim or Interest, including, without limitation, the resolution of any request for payment of any Administrative Expense and the resolution of any and all objections to the allowance or priority of Claims or Interests;

(b) Grant or deny any and all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan, for any period ending on or before the Effective Date;

(c) Resolve any motions pending on the Effective Date to assume, assume and assign or reject any executory contract or unexpired lease to which the Debtor is a party or with respect to which the Debtor may be liable and to hear, determine and if necessary, liquidate, any and all Claims arising therefrom;

(d) Ensure that distributions to holders of Allowed Claims and Allowed Interests are accomplished pursuant to the provisions of this Plan;

(e) Decide or otherwise resolve any and all applications, motions, adversary proceedings, contested or litigated matters, and any other matters or grant or deny any applications involving the Debtor that may be pending on the Effective Date;

(f) Enter such Orders as may be necessary or appropriate to implement or consummate the provisions of the Plan and all contracts, instruments, releases and other agreements or documents created in connection with the Plan or Disclosure Statement or to enforce all orders, judgments, injunctions, and rulings entered in connection with the Case;

(g) Resolve any and all controversies, suits or issues that may arise in connection with the consummation, interpretation or enforcement of the Plan or any Entity's obligations incurred in connection with the Plan;

(h) Modify the Plan before or after the Effective Date pursuant to section 1127 of the Bankruptcy Code, or to modify the Disclosure Statement or any contract, instrument, release or other agreement or document created in connection with the Plan or Disclosure Statement;

(i) Remedy any defect or omission or reconcile any inconsistency in any Order, the Plan, the Disclosure Statement or any contract, instrument, release or other agreement or document created in connection with the Plan, to the extent authorized herein or in the Bankruptcy Code;

(j) Issue any injunctions, enter and implement other Orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with consummation or enforcement of the Plan;

(k) Enter and implement such Orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked or vacated;

(1) Detennine any dispute arising under or related to the Plan, including, without limitation, any dispute concerning the scope or effect of any release or discharge provided for by the Plan or the Confirmation Order;

(m) Determine any other matters that may arise in connection with or relate to the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release or other agreement or document created in connection with the Plan or Disclosure Statement; and

(n) Adjudicate any application, motion, adversary proceeding or contested matter pending in the Bankruptcy Court on, or initiated following the Effective Date, including, but not limited to, any claims or causes of action brought by the Committee pursuant to section 7.8 of the Plan.

(o) Enter an Order or Final Decree concluding the Case.

Dated: New York, New York March 24, 1999

INDU CRAFT, INC.

By: /s/ HEMANT MEHTA Hemant Mehta, its President

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.

Attorneys for the Debtor 1345

Avenue of the Americas New York, New York 10105

By: /s/ A. MITCHELL GREENE A. Mitchell Greene (AMG-5900)

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Case No. 97 B 44958 (JHG)
Hearing Date and Time: March 25, 1999 at 9:30 a.m.

In Re: INDU CRAFT, INC.,
Debtor.

MODIFICATIONS TO SECOND AMENDED PLAN OF REORGANIZATION OF INDU CRAFT, INC.
TO THE HONORABLE JEFFRY H. GALLET, UNITED STATES BANKRUPTCY JUDGE:

Indu Craft, Inc. the debtor and debtor in possession (the "Debtor"), by its attorneys, Robinson Brog Leinwand Greene Genovese & Gluck P.C., pursuant to Section 1127 of title I I of the United States Code (the "Bankruptcy Code") and Rule 3019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), submit the following modifications to the Second Amended Plan of Reorganization of Indu Craft, Inc. (the "Plan")fn1:

1. The caption of the Plan is amended to read as follows: Second Amended Plan of Reorganization of Indu Craft, Inc., as Modified
2. Section 1.27 of the Plan is deleted in its entirety.
3. Section 1.37 of the Plan is deleted in its entirety.
4. Section 1.38 of the Plan is deleted in its entirety.
5. Section 1.40 of the Plan, which is now new Section 1.37, is amended to provide that:

1.37 "New Loan" means the sum of $600,000 to be lent to the Debtor by Funder on the Effective Date funding the payments to creditors and the balance, if any, for the prosecution of post-Effective Date claims, including but

not limited to an action entitled Bank of India, Plaintiff -against-Trendi Sportswear. Inc.. Defendant, Third Party Plaintiff -against-Indu Craft, Inc., Third Party Defendant and Fourth Party Plaintiff, -against-Bank of Baroda Fourth Party Defendant pending in the United States District Court for the Southern District of New York, bearing Index No. 89 C.V.. 5996 (JSM) ("Baroda II").

6. Section 1.43, which is now new Section 1.40, is amended to provide that: 1.40 "Plan" means this Second Amended Plan of Reorganization for Indu Craft, Inc., As Modified, as it may be further amended, supplemented or modified from time to time, including any exhibits or schedules annexed hereto or required to be filed with the Bankruptcy Court pursuant hereto.

7. Section 4.2 of the Plan is amended to provide, as follows: 4.2 Class 2 - IRS Secured Claim. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, in full satisfaction of the IRS Secured Claim against the Debtor, if any, the IRS shall receive payment in cash, in the amount of one hundred (100%) percent of its Allowed Secured Claim.

8. Section 4.3 of the plan is amended to insert the word "Allowed" before the word "Unsecured" on the last line of the Section.

9. Section 5.1 of the Plan is deleted in its entirety and the following new Section 5.1 is inserted in lieu thereof:

(a) The Tze Wung Secured Claim shall be an Allowed Claim, in the amount of $1,820,000, for the reimbursement of monies loaned to or incurred or paid by Tze Wung on behalf of the Debtor for legal fees and expenses incurred in connection with litigation which resulted in the issuance of a judgment against Bank of Baroda in the Debtor's Favor, in the amount of $2,519,822.29, on July 31, 1996;

(b) On the Effective Date Tze Wung shall receive payment, in cash, in the amount of $620,000;

(c) On the Effective Date, Tze Wung shall issue to the Debtor the New Loan, in the sum of $500,000. As security for the New Loan, the Debtor will provide Tze Wung with a promissory note and security interest in all of the Debtor's tangible and intangible property, wherever located, including but not limited to, the proceeds generated from Baroda 11 or any other claim or cause of action of the Debtor;

(d) For repayment of the New Loan, Tze Wung shall receive the first proceeds, in the amount of $500,000, generated by the successful prosecution or settlement of Baroda 11 or any other claim or cause of action of the Debtor;

(e) The Debtor shall not be obligated to repay any of the New Loan for the first twelve (12) months of the term of the New Loan. Thereafter, commencing on the thirteenth (13th) month of the term of the New Loan, the New Loan shall bear interest at the rate of nine (9%) percent per annum, and interest shall be payable monthly; and

(f) The Debtor shall be obligated to reimburse Tze Wung for any legal fees and costs it incurs in enforcing the terms of this Section 5.1 of the Plan and the promissory note described in this Section 5.1 of the Plan.

10. Section 5.2 of the Plan is deleted in its entirety and the following new Section 5.2 is inserted in lieu thereof:

5.2 Class 5 -Subordinated Unsecured Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims; (i) two of the three Class 5 claimants, Trendi Sportswear, Inc. ("Trendi") and ANZ Sales, Inc., ("ANZ") shall receive cash, in the amount of $200,000, which Trendi and ANZ shall share pro rata or otherwise agreed between them, and (ii) Trendi, ANZ and Hemant

Mehta, the holders of Claims in Class 5, shall receive their net proceeds of any recovery in Baroda 11, as defined in the Plan, after deduction for the reimbursement to Tze Wung Consultants, Ltd. of its funding of the Plan, the funding of the Baroda II litigation pursuant to a future agreement, legal fees, costs and disbursements. The Debtor agrees to consent to judgment being entered against it in the third party action in Baroda II for the amount of Trendi's claim as determined by the Bankruptcy Court.

11. Section 5.3 of the Plan is amended to delete the words "Capital Contribution" at the end of the Section, and to replace those words with the word "Loan."

12. Section 7.1 (b) of the Plan is amended to provide that: (b) On the Effective Date, the Funder shall make the New Capital Loan to the Debtor and the Debtor. The Debtor shall utilize the proceeds of the New Capital Loan for the funding of the payments to creditors and the balance, if any, for the prosecution of Post-Effective Date claims, including but not limited to Baroda II and payment of Allowed Claims in accordance with this Plan.

13. Section 7.4 of the Plan is amended to provide that: 7.4 Funding. (a) Payments and distributions to be made under the Plan to the holders of Administrative Claims, Priority Claims, IRS Claim, EVW Secured Claim, Trustee Fees, and Unsecured Claims shall be made by the Disbursing Agent from (i) the Interpleader Proceeds, (ii) the New Loan and (iii) the proceeds of any claim, right or cause of action belonging to the Debtor and prosecuted pursuant to section 7.8 of the Plan.

14. Pursuant to section 1127(a) of the Bankruptcy Code, the Plan, as modified herein, shall be the Plan.

Dated: New York, New York
March 24, 1999

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.
Attorneys for Indu Craft, Inc. 1345 Avenue of the Americas New York, NY 10105 (212) 586-4050

By: /S/ A. MITCHELL GREENE A. Mitchell Greene (AMG-5900)

SO ORDERED
THIS 29th DAY OF MARCH, 1999
s/Jeffry H. Gallet
Honorable Jeffry H. Gallet United States Bankruptcy Judge

Footnotes -

Fn1 All capitalized terms used herein and not otherwise defined are used with the meaning given to such terms in Article 1 of the Plan.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Case No. 97 B 44958 (JHG)

In Re: Chapter I I
INDU CRAFT, INC., Debtor.

ORDER CONFIRMING PLAN OF REORGANIZATION

The Debtor having proposed and filed its Second Amended Plan of Reorganization under Chapter 11 of Title 11 of the United Sates Code (the "Bankruptcy Code"), dated November 9, 1998 (the "Plan") fn1; and after a hearing to consider approval of the Debtor's Disclosure Statement for Second Amended Plan of Reorganization of Indu Craft, Inc. dated November 9, 1998 (the "Disclosure Statement") on notice to all holders of Claims and Interests in the Case, the Disclosure Statement having been approved by order dated November 24, 1998 (the "Disclosure Statement Order"); and pursuant to the Disclosure Statement Order, copies of the Second Amended Plan of Reorganization of Indu Craft, Inc., the Disclosure Statement, a "Notice Fixing the Time for Acceptances or Rejections of the Plan, the Hearing on the Confirmation of the Plan and the Time for Filing Objections to Confirmation; and the ballot form for acceptance or rejection of the Plan (collectively, the "Solicitation Materials") having been transmitted to all holders of Claims and Interests; and the solicitation of acceptances from holders of Claims in this Case having been made within the time and in the manner required by the Disclosure Statement Order; and it appearing that pursuant to certain stipulations and orders submitted to at the hearing to consider confirmation of the Plan (the "Stipulations"), the terms of which have been

incorporated into the modifications to Second Amended Plan of Reorganization of Indu Craft, Inc. (the "Modifications") which have been filed with the Court on March 24, 1999;

AND the Court having approved the Modifications, (the Second Amended Plan of Reorganization of Indu Craft, Inc., dated November 9, 1998, as Modified by the Modifications and now entitled the Second Amended Plan of Reorganization of Indu Craft, Inc., as Modified, dated March 24, 1999 shall be hereinafter referred to as the "Modified Plan") and an adjourned hearing to consider confirmation of the Plan having been held by the Court on March 26, 1999 upon proper and timely notice to all persons entitled thereto in accordance with the Disclosure Statement Order, section 1128 of the Bankruptcy Code and Rule 2002(b) of the Federal Rules of Bankruptcy Procedure; and

It having been determined after a hearing on notice that in accordance with Rules 3018, 3019, 7052 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and §§363, 365, 1123, 1126, 1127, 1129, 1141 and 1146 of Title 11 of the United States Code (hereinafter the "Bankruptcy Code "), the Court makes the following findings of fact and conclusions of law which support Confirmation of the Modified Plan. To the extent any finding of fact contained herein shall later be determined to be a conclusion of law, it shall be so deemed and to the extent any conclusion of law contained herein shall later be determined to be a finding of fact, it shall be so deemed. The Court finds that

1. This matter is a core proceeding arising under §§ 1128 and 1129 of the Bankruptcy Code.

2. All persons entitled to notice of the Confirmation Hearing have received such proper and adequate notice in a timely fashion in accordance with the manner required by the prior order(s) of this Court.

3. The Modified Plan has been accepted in writing by all of the Classes whose acceptances are required by law.

4. The Modified Plan complies with all applicable provisions of the Bankruptcy
Code.

5. The Modified Plan has been proposed in good faith and not by any means forbidden by law and viewed in the light of the totality of the circumstances, the Modified Plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code.

6. The Modified Plan properly classifies Claims and Interests as required by § 1122 of the Bankruptcy Code. The Claims and Interests within each Class designated under the Modified Plan are substantially similar.

7. The classification of individual claims and interests was properly made and is appropriate in accordance with the teens of the Modified Plan and the requirements of § 1122 of the Bankruptcy Code for the purposes of tabulating ballots accepting and rejecting the Modified Plan and for the purposes of distribution ofthe consideration to be distributed to holders of Claims and Interest under the Modified Plan.

8. The Modified Plan specifies the Classes of Claims and Interests that are impaired or not impaired, as required by §1123(a)(2) of the Bankruptcy Code, and specifies the treatment of each class of Claims and Interest that is impaired under the Modified Plan, as required by § 1123(a)(3) of the Bankruptcy Code.

9. The Modified Plan complies with §§1123(a)(6) and 1123(a)(7) of the Bankruptcy Code in that it is consistent with the interests of creditors and equity holders and with public policy.

10. The Debtor, its officers, agents, shareholders and professionals have acted in "good faith" for purposes of § 1125(e) of the Bankruptcy Code, and the proponents of the Modified Plan have complied with all applicable provisions of the Bankruptcy Code.

11. Each holder of a claim or interest has accepted the Modified Plan or will receive or retain on account of such claim or interest under the Modified Plan property of a value, as of the Effective Date of the Modified Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

12. The Modified Plan does not discriminate unfairly, and is fair and equitable, with respect to each Class of Claims or Interests that is impaired under, and has not accepted, the Modified Plan.

13. The Modified Plan provides, that with respect to Secured Claims, that said claims will be paid in full and that until such time, the holders of such claims shall retain the liens securing such claims to the extent of the allowed amount of such claim.

14. As required by § 1129(a)(4) of the Bankruptcy Code, all payments made or promised by the Debtor or by any person issuing securities or acquiring property under the Modified Plan or by any other person for services or for costs and expenses in, or in connection with, the Modified Plan and incident to the above-captioned Chapter 11 Case, have been fully disclosed to the Court and are reasonable or, if to be fixed after Confirmation of the Modified Plan, will be subject to the approval of the Court.

15. In accordance with the requirements of 11 U.S.C. § 1129(a)(5)(A), the identity, qualifications and affiliations of the persons who are proposed to serve as directors or officers, or voting trustee, if any, of the Debtor after Confirmation of the Modified Plan, have

been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy.

16. In accordance with the requirements of 11 U.S.C. § 1129(a)(5)(B), the identity of any insider that will be employed or retained by the Debtor and his or her compensation have been fully disclosed.

17. The Modified Plan is feasible and Confirmation of the Modified Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor under the Modified Plan.

18. All fees payable under 28 U.S.C §1930 have been paid or shall be paid pursuant to the Modified Plan on the Effective Date.

19. The Modified Plan provides for the treatment of administrative and priority claims in the manner required by § 1129(a)(9) of the Bankruptcy Code.

20. As to the Debtor, at least one Class that is impaired under the Modified Plan has accepted the Modified Plan.

21. The Modified Plan contains adequate, proper and legal means for implementation in accordance with § 1123 of the Bankruptcy Code.

22. The Modifications proposed by the Debtor in accordance with § 1121 of the Bankruptcy Code, are, pursuant to § 1127(a) of the Bankruptcy Code, to modify the Modified Plan and are incorporated into the Modified Plan so as to be part of the Modified Plan. The Modifications are a variety of immaterial modifications that do not change the treatment of Claims under the Modified Plan or Creditors rights with respect thereto except to the extent such treatment has been agreed to by said party and therefore, do not adversely affect any parties in this case. Accordingly, no further solicitation

or disclosure is necessary and therefore, the Plan and the Modifications, with respect thereto, comply with §1127 of the Bankruptcy Code and Bankruptcy Rule 3019.

23. The Debtor has no "retiree benefit" payment obligations, as such term is defined in § 1114 of the Bankruptcy Code and therefore, § 1129 (a) (13) of the Bankruptcy Code is inapplicable to the Modified Plan. Additionally, there are not rate changes provided for in the Modified Plan.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

A. The Modified Plan, a copy of which is annexed hereto as Exhibit "A", is hereby approved and confirmed in all respects.

B. The Modified Plan meets and complies with the applicable provisions of the Bankruptcy Code.

C. The Debtor and its bankruptcy counsel are designated as the appropriate persons to sign and execute all documents necessary to implement the Modified Plan and are hereby authorized to take such actions.

D. The Provisions of the Modified Plan shall bind the Debtor, the Debtor subsequent to the Confirmation Date (the "Reorganized Debtor") and all creditors of the Debtor, whether the respective claims or interests of such creditors or interest holders are impaired under the Modified Plan, whether such creditors have accepted the Modified Plan, and whether such creditors have filed proofs of claim or are deemed to have filed proofs of claim.

E. Except as otherwise provided for herein, or in the Modified Plan, on the Effective Date, all assets and properties of the Estate shall revest in the Debtor free and clear of all Liens, Claims and encumbrances and any such Liens, Claims and encumbrances that have not

been expressly preserved under the Modified Plan shall be deemed extinguished.

F. Except as otherwise provided in the Modified Plan and this Order, or any subsequent orders, entered after notice to the appropriate parties in interest on and after the Confirmation Date:

(1) (a) The provisions of the Modified Plan shall bind the Debtor, all creditors and interest holders except as provided for in this Order or in the Modified Plan and the Debtor shall be discharged pursuant to § 1141 of the Bankruptcy Code from all Claims against and Interests in the Debtor that arose prior to the Effective Date and from any liability of a kind specified in §§502(g), 502(h) or 502(i) of the Bankruptcy Code whether (i) a Proof of Claim or Proof of Interest has been filed or deemed to have been filed with respect to such Claim or Interest, (ii) such Claim or Interest is allowed or disallowed, or (iii) the holder of such Claim or Interest has accepted the Modified Plan.

(b) Except as otherwise provided in the Modified Plan, all Persons shall be precluded and enjoined from asserting against the Debtor, successors, assets or properties, or against any property that is distributed, or is to be distributed under the Modified Plan, any other or further Claim or Interest based upon any acts or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date.

(c) Except as otherwise provided under the Modified Plan or a Final Order of the Bankruptcy Court, any judgment at any time obtained, to the extent that such judgment is a determination of the liability of the Debtor with respect to any debt discharged pursuant to the Modified Plan and § 1141(d)(1) of the Bankruptcy Code, shall be null and void and of no force and effect, regardless of whether a Proof of Interest therefor was filed or deemed filed and, except as otherwise provided in the Modified Plan, all Creditors holding Claims

against the Debtor shall be precluded from asserting against the Debtor or any of their assets or properties, any other or further Claims or Interests based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date, and the Confirmation Order shall permanently enjoin all Creditors and holders of Interests, their successors and assigns, from enforcing or seeking to enforce any such Claims or Interests.

The foregoing injunction shall apply to the holder of a debt, claim or interest, whether or not a proof of claim was filed or deemed filed, whether such claim was allowed, whether the holder of such claim accepted the Modified Plan, and whether the right to payment was reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. Any person injured by any willful violation of this injunction shall recover actual damages including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages from the willful violator.

(2) Except (i) as otherwise provided in the Modified Plan, (ii) as otherwise provided under Final Order entered by the Bankruptcy Court or (iii) with respect to the Debtor's obligations under the Modified Plan, the entry of the Confirmation Order shall forever stay, restrain and permanently enjoin (i) the commencement or continuation of any action, the employment of process, or any act to collect, enforce, attach, recover or offset from the Debtor, or from property of the Debtor , (ii) the creation, perfection or enforcement of any lien or encumbrance against any property of the Debtor or any property distributed under the Modified Plan, or (iii) any Claim or Interest discharged under the Confirmation Order, the Modified Plan or pursuant to § 1141(d)(1) of the Bankruptcy Code.

(3) Nothing in this Confirmation Order or the Modified Plan shall effect a release in favor of any of the "Released Entities" with respect to any liability to the United States Government ;or any other person[s] or entities, nor shall anything in this Confirmation Order or the Plan enjoin the United States Government, or any other person[s] or entities from bringing any claim, suit, action or other proceeding against any of the Released Entities for any liability arising under any law of the United States; provided however, that this paragraph shall in no way affect or limit the discharge granted to Debtor under Chapter 11 of the Bankruptcy Code

(4) Section 9.3 of the Modified Plan is deleted in its entirety.

G. Pursuant to § 1146(c) of the Bankruptcy Code, all filing officers, including, without limitation, the Office of the Register of the City of New York, New York shall be, and hereby are, directed to accept from the Debtor for recording and shall record this Order, as well as any other documents or instruments which may be required to effectuate the provisions of the Modified Plan and are reasonably within the power of the Debtor to execute and deliver or to obtain, and presented for recording, immediately upon presentation thereof at any time after the date of this Order, unconditionally and without reservation, and without the assessment and payment of any and all Transfer Taxes, including any interest, penalties and additions to such taxes. The Court hereby specifically retains jurisdiction to enforce the provisions of this paragraph G and to hear and determine any claims, issues and controversies that may hereinafter arise in respect of or relating to this paragraph G.

H. All requests for payment of Administrative Claims and other claims by a governmental unit for taxes (and for interest and/or penalties related to such taxes) for any tax year or period, all or any portion of which occurs or falls within the period from and including July

25, 1997, the Petition Date, through and including the Effective Date ("Post-Petition Tax Claims") and for which no bar date has otherwise been previously established, must be filed on or before the later of (1) sixty (60) days following the Effective Date; or (2) one hundred twenty (120) days following the filing of the tax return for such taxes for such tax year or period with the applicable governmental unit.

I. Any claims of a kind specified in Paragraph I hereof which are not filed on or before the respective deadline set forth therein and under the Modified Plan shall not participate in any distribution under the Modified Plan and shall be forever barred from asserting any such claim against the Debtor, its estate, or the Reorganized Debtor.

J. Any Liens held against the Debtor's property by any creditor of the Debtor must be released as a condition to payment of any Allowed Claim held by such creditor.

K. Each federal, state and local governmental agency or department is hereby directed to accept and file or record as the case may be any and all documents and instruments necessary and appropriate to consummate the Modified Plan.

L. Pursuant to § 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of a security under the Modified Plan or the revesting, transfer or sale of any real or personal property of the Debtor, the estate, or the Reorganized Debtor in accordance with the Modified Plan shall not be taxed under any state or local law imposing a stamp tax, transfer tax, mortgage recording tax or similar tax.

M. Pursuant to the Modified Plan the following distributions shall be made on the Effective Date:

(1) In accordance with the Stipulation and Order entered by the Court on March 9, 1999, in full satisfaction of the IRS Secured Claim against the

Debtor, the IRS shall receive payment in cash, in the amount of one hundred (100%) percent of its allowed secured claim;

(2) Tze Wung shall receive payment, in cash, in the amount of $620,000.00, for the reimbursement of monies loaned to or incurred or paid by Tze Wung on behalf of the Debtor, for legal fees and expenses incurred in connection with litigation which resulted in the issuance of a judgment against Bank of Baroda in the Debtor's favor in the amount of $2,519,822.29 on July 21, 1996;

(3) The State of New York shall receive the sum of $15,000.00 on account of its priority unsecured claim, in accordance with a Stipulation approved by this Court

(4) Two of the three holders of Class 5 claimant Trendi Sportswear, Inc. ("Trendi") and ANZ Sales, Inc. ("ANT") shall receive cash, in the amount of $200,000.00, which Trendi and ANZ shall share pro rata or as otherwise agreed between them, and

(5) The following remaining holders of unsecured claims without priority in Class 3 shall receive monies disbursed as follows:

(a) Vinod Gaglani, on account of his unsecured claim against the Debtor, shall receive the sum of $30,000.00;

(b) The Internal Revenue Service, on account of its FUTA unsecured claim, shall receive the sum of $2,560.49;

(c) Patrick McCarthy, on account of services rendered to the Debtor, shall receive the sum of $1,606.50; and

(d) John Zampino, on account of services rendered on behalf of the Debtor shall receive the sum of $6,889.76.

N. Should there be any ambiquity between Section 5.2 of the Modified Plan and the Stipulation and Order Settling the Claim of Vinod Gaglani and Governing Treatment of Vinod Gaglani's claim in the Plan of

Reorganization, dated March 24, 1999 (the "Stipulation"), the Stipulation shall govern.

O. This Order and all related agreements and documents necessary to implement the Modified Plan shall be binding upon and inure to the benefit of any successors and assigns of the Debtor.

P. Notice of the entry of this Confirmation Order, in the form attached hereto as Exhibit "B," shall be mailed to all of the Debtor's Creditors, Interest Holders and such parties as are entitled to notice.

Q. In accordance with the Modified Plan, any claims or interests not expressly preserved by this Confirmation Order or in the Modified Plan shall be extinguished as of the Effective Date.

R. The Court shall retain jurisdiction with respect to such matters set forth in Article 11 of the Modified Plan.

S. The Reorganized Debtor shall be responsible for the payment of post-confirmation quarterly fees imposed 28 U.S.C Section 1930(a)(6) and filing of post-confirmation reports until the final decree is entered.

Dated: New York, New York March 29 , 1999
S/Jeffry H. Gallet Honorable Jeffry H. Gallet United States Bankruptcy Judge

Footnotes

Fn1 Capitalized terms not otherwise defined herein shall have the meanings ascribed to the terms in the Plan.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:
INDU CRAFT, INC.
Debtor

Chapter 11
Case No. 97-B-44958 (JHG)

STIPULATION AND ORDER GOVERNING TREATMENT OF TRENDI SPORTSWEAR, INC.'S CLAIM IN PLAN OF REORGANIZATION

WHEREAS, on possession (the "Debtor") filed a voluntary petition for relief under Chapter 11 of Title l 1 of the United States Code; and

WHEREAS, no committee has been appointed by the Office of the United States Trustee in the Debtor's Chapter 11 case; and

WHEREAS, on September 8, 1997, Trendi Sportswear, Inc. ("Trendi') filed a Proof of Claim in this Court asserting an unsecured claim, in an unknown amount (hereinafter the "Claim"); and

WHEREAS, by notice of motion dated July 30, 1998 the Debtor objected to certain claims including Trendi's Claim based on the fact that it was filed in an undetermined amount; and

WHEREAS, Trendi thereafter submitted numerous documents, along with a Memorandum of Law and Affidavit of Ronald Quintero and Jagdish Patel, in support of Trendi's Claim, as amended for $2,777,027.95,

as of December 31, 1987, for lost profits and $8,225,000, as of December 3, 1987, for the destruction of it business; and

WHEREAS, the Debtor filed a Response and Supplemental Response to Trendi's submissions; and

WHEREAS, on or around November 9, 1998 the Debtor filed its Second Amended Plan of Reorganization (the "Plan") and Second Amended Disclosure Statement and by order dated November 24, 1998, this Court found that the disclosure statement contained "adequate information" as that term is defined in §1125(a)(1) of the Code and scheduled a hearing to consider confirmation of the Plan, fixing a date by which ballots on the Plan must be filed with the Debtor and objections to confirmation filed with the Debtor and the Court; and

WHEREAS, Trendi has yet to cast a ballot accepting or rejecting the Plan; and

WHEREAS, the Debtor and Trendi have agreed to modify the treatment of Trendi's claim under the Plan, and as a result Trendi has agreed to vote in favor of the Plan.

NOW THEREFORE IT IS STIPULATED AND AGREED:

1. Section 5.2 of the Plan shall be modified with respect to the treatment of the Class 5 Subordinated Unsecuted Claims to provide as follows:

Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims; (i) two of the three Class 5 claimants, Trendi Sportswear, Inc. ("Trendi") and ANZ Sales, Inc., ("ANZ") shall receive cash, in the amount of $200,000, which Trendi and Trendi shall share pro rata, or as agreed between them, and (ii) Trendi, ANZ and Hemant Mehta, the holders of claims in Class 5, shall

receive their net proceeds of any recovery in Baroda II, as defined in the Plan, after deduction for the reimbursement to Tze Wung Consultants, Ltd. of its funding of the Plan, the funding of the Baroda II litigation pursuant to a future agreement, legal fees, costs and disbursements. The Debtor agrees to consent to judgment being entered against it in the third party action in Baroda II for the amount of Trendi's claim as determined by the Bankruptcy Court.

2. Trendi shall be deemed to have cast a ballot in favor of the Plan, as modified by paragraph 1 of this Stipulation, and this Stipulation shall constitute acceptance to any Plan containing the terms hereof.

3. This Stipulation may be signed in counterparts, and, as such shall be deemed completely and fully binding upon each of the parties which execute this Stipulation, subject to the provisions of paragraph 4, infra.

4. No additional documentation shall be required to effectuate the terms of this Stipulation which shall become effective only upon entry of an order confirming the Plan.

Dated: New York, New York March 24, 1999
ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.
Attorneys for Indu Craft, Inc. 1345 Avenue of the Americas New York, New York 10105 (212) 586-4050
By: /S/ A. MITCHELL GREENE
A. Mitchell Greene (AMG-5900)
Dated: New York, New York March 24, 1999
TRENDI SPORTSWEAR, INC.
By: /S/ E. TRENDY
"SO ORDERED"
This 13' Day of April, 1999
s/Jeffry H. Gallet Honorable Jeffry H. Gallet United States Bankruptcy Judge

HEARING DATE: September 10, 1997 9:30 a.m.
UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Case No. 97 B 44958 (JHG)

In re: :
INDU CRAFT, INC..
Chapter 11
Debtor.

LIMITED OBJECTION TO RELIEF FROM AUTOMATIC STAY AND TO CONVERT TO CHAPTER 7

TO: THE HONORABLE JEFFRY H. GALLET
UNITED STATES BANKRUPTCY JUDGE:

BANK OF BARODA (the "Bank") by and through its undersigned attorneys NIXON, HARGRAVE, DEVANS & DOYLE LLP, as and for its limited objection to an order for relief from the automatic stay and to convert to Chapter 7, as proposed by Eaton & Van Winkle, respectfully represents:

1. The Bank is a creditor and party in interest herein, having filed a Proof of Claim in the amount of $27,191.41.

2. The Bank takes no position with respect to the branch of the motion that seeks a conversion of these proceedings to Chapter 7.

3. As for the branch of the motion that seeks a lifting of the stay to permit Magistrate Judge Bernikow to determine the amount ofEaton & Van Winkle's charging lien, the Bank believes that the relief granted should be more clear than the motion contemplates.

4. By way of background, Eaton & Van Winkle applied to Judge Bernikow for an order fixing the amount of its charging lien, but without the Bank (or any other creditor) having access to the underlying fee bills or other supporting documentation.

Accordingly, the proceedings before Judge Bernikow did not (and do not) comport with what is required in this Court for the allowance of a claim.

5. In view of the foregoing, the Bank requests that any order entered on the motion: (i) expressly withhold allowance of Eaton & Van Winkle's claim in this Court pending further proceedings, and. (ii) preserves the right of the debtor, any trustee, any creditor, and any party in interest to object to the allowance of Eaton & Van Winkle's claim.

New York, New York
September 5, 1997
NIXON, HARGRAVE, DEVANS & DOYLE LLP

Kermitt J. Brooks
(KS-3229)
Attorneys for the Bank of Baroda
437 Madison Avenue
New York, New York 10022
Tel. (212) 940-3000

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Return Date and Time:
January 16, 1998 at 9:30 a.m.
Case No. 97 B 44958 (JHG)
Chapter 11

In Re:
INDU CRAFT, INC., Debtor.

NOTICE OF HEARING TO CONSIDER APPROVAL DISCLOSURE STATEMENT

TO: ALL PERSONS AND ENTITIES ASSERTING CLAIMS AGAINST OR INTERESTS IN INDU CRAFT, INC.

PLEASE TAKE NOTICE, that the United States Bankruptcy Court for the Southern District of New York has entered an order dated December 12, 1997; determining that on January 16, 1998 at 9:30 a.m., in the United States Bankruptcy Court, Alexander Hamilton Custom House, One Bowling Green, Fifth Floor, Room 523, New York, New York 10004, a Hearing will be held before the: Honorable Jeffry H. Gallet, United States Bankruptcy Judge, consider the granting of an Order (i) approving the Disclosure Statement filed by the Debtor; (ii) authorizing the Debtor to solicit acceptances of its Plan of Reorganization from the holders of all Claims and interests that are impaired by the Plan, by transmitting a copy of the Disclosure Statement and the Plan to such holders of Claims and interests; (iii) fixing a date by which all acceptances or rejections must be received in order for them to be counted in the determination of whether the Plan has been accepted;

(iv) setting a Hearing on confirmation of the Plan; and (v) granting the Debtor such other and further relief as is just.

Copies of the Debtor's Chapter 11 Schedules, Proposed Plan of Reorganization of Indu Craft, Inc. (the "Plan") and Proposed Disclosure Statement for the Plan of Reorganization of Indu Craft, Inc. (the "Disclosure Statement") are on file with the Clerk of the Bankruptcy Court,.and may be examined by interested parties during regular business hours.

Objections or proposed modifications to the Disclosure Statement must be in writing and filed with the Clerk of the Bankruptcy Court and received by the attorneys for the Debtor, whose address is given below, not later than January 12, 1998.

Upon approval of the Disclosure Statement by the Bankruptcy Court, holders of Claims against, and interests in, the Debtor, whose Claims and interests are impaired by the Plan, will receive a copy of the Disclosure Statement and the Plan.

The Hearing scheduled herein to consider the proposed Disclosure Statement -may be adjourned from time to time without further notice except by announcement of such adjournment on the date scheduled for the Hearing.

DATED: New York, New York
December 12, 1997

BY ORDER OF THE COURT
JEFFRY H. GALLET
United States Bankruptcy Judge

Robinson Brog Leinwand Greene Genovese & Gluck P.C.
Attorneys for the Debtor
1345 Avenue of the Americas
New York, New York 10105
Attn: A. Mitchell Greene 212) 586-4050

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Return Date and Time:
January 16, 1998 at 9:30 a.m.
Case No. 97 B 44958 (JHG)
Chapter 11

In Re:
INDU CRAFT, INC., Debtor.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

SS.=

COUNTY OF NEW YORK

I, Aida E. Fernandez, being sworn, say; I am not a party to the action, am over 18 years of age and reside in New York City, New York. On December 15, 1997, I served the within NOTICE OF, HEARING TO CONSIDER APPROVAL DISCLOSURE STATEMENT, by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

Persons on the attached service list.
Sworn to before me this 15th day of December, 1997.

INDU CRAFT, INC.

LIST

Commissioner of Labor
Building 9 Room 205
State Campus
Albany, KY 12227

Trendi Sportswear Inc.
1407 Braodway 23rd Floor
New York, NY 10018

Internal Revenue Service
Holtsville, NY 00501

Kathleen M. Reidy, Esq.
United States Attorney
for the SDNY
100 Church Street
New York, NY 10007

NYS Dept. of Law
120 Broadway
New York, NY 10271

Hemant Mehta
P.O. Box 316
New York, NY 10018-0136

Attn: Douglas Capuder, Esq.
CAPUDER & ARNOFF, P.C.
40 Wall Street
New York, NY 10005-2388

John P. Zampimo, Esq
600 Third Avenue
New York, NY 10016

ANZ Sales Inc.
C\O Krishna Vempath, Esq.
117-14 Queens Boulevard
Forest Hill, NY 11375

EATON & VAN WINKLE
Attn: Robert Gross
600 Third Avenue
New York, NY 10016

Tze Wung Consultants LTD
Mannlife Towers, 7th Floor
169 Electric Road
Hong Kong

NYC Dept. of Taxation & Finance
345 Adams Street, 10th Floor South
Attn: B & A Unit
Brooklyn, NY 11201

Constance M. Boland, Esq.
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DOYLE & LLP
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New York, NY 10022

NYS Dept. of Taxation & Finance
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New York, NY 10038

Tracy Hope Davis, Esq.
OFFICE OF THE U.S. TRUSTEE
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New York, NY 10004

Mark Ledwin, Esq.
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
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White Plains, NY 10604

Patrick McCarthy Credit
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Greenwich, CT 06830

Bank of Baroda
One Park Avenue
New York, NY 10016

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Flushing, NY 11355

NYS Dept. of Taxation & Finance
Building 9, Room 205
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Peter Schmerge
BLEAKLEY PLATT & SCHMIDT
1 North Lexington Avenue
White Plains, NY 10601

Richard Morrissey
Asst. U.S. Attorney
Mary Jo White
United States Attorney
100 Church Street, 19th Floor
New York, NY 10007

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

Return Date and Time:
January 17, 1998 at 4:30 a.m.
Case No. 97 B 44958 (JHG)
Chapter 11

In Re:
INDU CRAFT, INC., Debtor.

OBJECTION TO DEBTORS APPLICATION IN SUPPORT OF MOTION AUTHORIZING DEBTOR TO PARTIALLY PAY THE PRE-PETITION CLAIM OF TZE WUNG CONSULTANTS, INC.

TO: THE HONORABLE JEFFREY If. GALLET
UNITED STATES BANKRUPTCY Y JUDGE

The Bank of Baroda (the "Bank"), a creditor in this bankruptcy proceeding, hereby objects to the motion brought by Debtor Indu Craft. Inc. ("Debtor") for an order authorizing the Debtor to pay the sum of $ 1,200.000.00 to Tze Wung Consultants Ltd. ("Tze in partial satistaction of its pre-petition. unsecured. general claim for the following reasons:

1 . There is absolutely no legal authority and Debtor cites this Court to no authority, warranting the relief sought here – pre-confirmation payment to a general creditor. There is simply no basis in the Bankruptcy Code to make such a distribution. In fact. the relief sought in this motion is directly contrary to the purpose of Chapter 11. which contemplates debtors paying general creditors only after confirmation of a plan that addresses the rights of all creditors.

2. Debtors statements to the contrary. there is no assurance that Debtors proposed Plan will be or could be. confirmed. A final version ofthe Disclosure Statement has not yet been distributed to creditors. It is currently not possible to predict the amount of the distribution if any to unsecured creditors such as Tze Wung. until after all priority claims and secured claims. especially the large claims of the taxing, authorities. are liquidated. Despite these uncertainties. Debtor seeks to distribute one-Half of the proceeds of the Estate to a general creditor months before the plan may be confirmed.

3. Even if Debtor could provide some legal authority for its application which it cannot it. Debtor has failed to adduce any facts supporting this questionable distribution. Debtor's assertions that all creditors will he paid and that the "partial" payment of Tze Wung will not adversely impact other creditors is based on nothing more than assumptions. In its motion papers. Debtor states nothing more than that it "believes" the IRS will reduce its claim from $380,531 to $48.000. (See Motion, at 8.) Similarly. Debtor asserts that it "believes" creditor New York City will agree to accept payment of one-tenth of its claim. without alleging that it has negotiated an agreement with the City and without reterring this Court to evidence of any agreement. (See Motion, at 7.) Debtor makes the same allegation with respect to the claim of creditor New York State. alleging that Debtor "believes New York State will reduce its claim from $334.75-5 to $70,000. (See Motion at 7.) Debtor makes these assertions even though Debtor and the IRS arc currently involved in an adversary proceeding. they have been unsuccessfully negotiating a settlement of the IRS claim for months if not years. and there currently is no agreed upon settlement.

4. In its Disclosure Statement, Debtor stated that creditor ANZ Sales, Inc..("ANZ") asserted a claim in the amount of $2.2 million. (See Disclosure Statement. at 23.) This claim is based on two judgments Bank of India assigned to ANZ. One judgment Bank of India held against Hemant C. Mehta the principal of Debtor and the second judgment Bank of India held against Trendi Sports year Inc. ("Trendi"), an affiliate and creditor of Debtor. (See Disclosure Statement. at 23.) Conversely in its motion papers. Debtor asserts that the amount of ANZ's Claim is "unknown". (Motion, at 9. Par. 18.) Moreover. Debtor claims that the amount of Trendi's claim is also "unknown". failing, to reference the fact that Trendi's claim is based on a ThirdParty Complaint seeking in excess of $5.1 million from Debtor. Based on the total proceeds remaining in the Estate which are currently less than $2.0 million it does not seem probable or possible for Debtor to pay all of these claims in full. It follows that Debtor certainiv will not be able to pay all claims in full if it is allowed now to pay $1.2 million to Tze Wung Consultants, an entity that may be an insider. (See Disclosure Statement, at 23.) The Debtor states that Tze Wung has allegedly agreed to contribute $500,000 to partially fund the Debtors proposed Plan. It may be that the "new" money promised by Tze Wung will be obtained by re-cycling its claimed distribution. Why else would the Debtor try so hard to extract on behalf of Tze Wung $1.2 million from the Estate without a confirmed plan?

5. There are other gross inconsistencies between the Disclosure Statement, dated November 20. 1997, and the papers submitted in support of this motion. For example, in the Disclosure Statement. Debtor represented that Tze Wung held an unsecured. contingent claim in the amount of $1 .1 million. (See Disclosure Statement, at 23.) Now, without explanation, Debtor asserts that Tze Wung holds a "valid filed

secured claim" that has increased to $1.8 million. Although the Bank tiled a Notice of Appearance, it has not been notified of any cash infusions, provision of services, or any other investments made by Tze Wung to Debtor since November 20, 1997. Thus. without proof of the validity or amount of Tze Wung's claim, Debtor is seeking to pay what appears to be the entire contingent claim to Tze Wang. Furthermore, according to the Disclosure Statement. Tze Wung is or may be an insider. (See Disclosure Statement. at 23.) Thus. what Debtor may be seeking to do through this application is to gain possession of approximately one-half of the Estate for itselfbefore a plan has even been approved.

6. There are also various technical deficiencies in the Plan. including. among others the following:

According to the proposed Plan. the payment or priority claims will be delayed. which is not in accordance with bankruptcy law. (See Plan Par. 5.1).

The proposed Plan provides for the unsecured claims to be paid in full, but there is no proof that the proceeds of the Estate will be sufficient to pay all unsecured claims in full. There is no assurance that Debtor will secure future profitable business. as it alleges in the proposed Plan, and there is thus no evidence of the feasibility of Debtor's promise of full payment. (See Plan Par 5.4).

In calculating payments to be made from the proceeds of the Estate, in its motion papers. Debtor makes no provision for the priority payment of administrative expenses or attorneys fees. as it must.

The proposed Plan provides for the release of third parties. which is legally suspect. The release language is general and abstract - it does not fairly apprise creditors of its possible effect on claims against non-debtors. See,

Corbett v. MacDonald Moving Services. Inc.. 124 F.3d 82 (2nd Cir. 1997). (See Plan Pars.1.53, 9.1 (B) and 9.4.)

In sum, it is not clear that the proposed Plan will be approved and there is no legal or factual justification to pay $1.2 million now to Debtor's insider.

For the foregoing reasons. Debtors motion should be denied.

Dated: New York. New York
April 14. 1998

CONSTANCE M. BOLAND
(CMB-8900)
NIXON, HARGRAVE DEVANS & DOYLE LLP
Attorneys for Bank of Baroda
417 Madison Avenue
New York, New York 10024

TO: ROBINSON. BROG. LEINWAND GREENE. GENOVESE & GLUCK P.C.
1345 Avenue of the Americas New York, New York 10105-0143
Attn: Joel M. Shafferman, Esq.

CERTIFICATE OF SERVICE
I, Constance M. Boland, hereby certity that I caused a true and correct copy of the Objection to Debtors Application in Support of Motion Authorizing Debtor to Partially Pay the Pre-Petition Claim of Tze Wang Consultants. Inc. to be served on the following:
Joel M. Shafferman, Esq.
Robinson, Brog, Leinwand, Greene. Genovesc & Gluck P.C.

1345 Avenue of the Americas New York New York
10105-0143
by hand delivery on April 11, 1998.
CONSTANCE M. BOLAND

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

89 Civ 5996 (JSM)

Bank of India,
Plaintiff

VS.

Trendi Sportswear, Inc.,
Defendant & Third Party

Plaintiff-appellant

VS.

Indu Craft, Inc.,
Third Party Defendant
& Fourth Party
Plaintiff-Appellee

VS.

Bank of Baroda,
Fourth Party Defendant
Appellee

NOTICE OF APPEAL

PLEASE TARE NOTICE that the defendant and third party plaintiff appellant Trendi Sportswear, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from that portion of the Judgment of this Court (Hon. John . Martin, Jr., J.) which was entered on March 30, 2000, in the office of the Clerk of this Court and which granted the Fourth Party Defendant Bank of

Baroda's motion for summary judgment and which dismissed the Fourth Party complaint with prejudice, and which is attached as "Ex. 1" hereto; each and every portion of the "Opinion and Order" of this Court (Hon. John S. Martin, Jr., J.), dated September 11, 1998, which was entered in the office of the Clerk of this Court and which granted the Fourth Party Defendant Bank of Baroda's motion for summary judgment, and which is annexed as "Ex. 2" hereto; and each and every portion of the decision of the decision and order of this Court (Hon. John S. Martin, Jr., J.), of October 5, 1990, entered in the office of the Clerk of this Court on December 11, 1990, and which granted the Fourth party Defendant Bank.of Baroda's motion for stay of this proceeding pending the disposition of Indu Craft, Inc. v. Bank of Baroda & Anr., 87 Civ. 7379 (KTD), and which rejected Fourth Party Plaintiff Indu Craft, Inc.'s motion to sever and consolidate this action with the said Indu Craft, Inc. v. Bank of Baroda & Anr., 87 Civ. 7379 (KTD), and which decision and order was set forth in the transcript of October 5, 1990, entered in the office of the Clerk on December 11, 1990, herein, and which is annexed as "Ex: 3" hereto.

Dated: May 1, 2000
New York, New York
Law Office of Krishnan Chittur

Krishnan S. Chittur, Esq. (KC 9258)
317 Madison Avenue Suite 2310 New York, NY 10017-2301

Tel: (212) 949-9696 Fax: (212) 949-6241 Email : kchittur@aol. com
Attorneys for Trendi Sportswear, Inc.

DOCKET NO. 00-7157

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORAL ARGUMENT REQUESTED

BANK OF INDIA,
Plaintiff,

- against -

TRENDI SPORTSWEAR, Inc.,
Defendant.

TRENDI SPORTSWEAR, INC.,
Third-Party Plaintiff-Appellant,

- against -

INDU CRAFT, INC.,
Third-Party Defendant.

INDU CRAFT, INC.,
Fourth-Party Plaintiff-Appellant,

against -

BANK OF BARODA,
Fourth-Party Defendant-Appellee.

MOTION OF THE BANK or BARODA TO DISMISS THE NOTICE OF APPEAL OF TRENDI SPORTSWEAR, INC.

NIXON PEABODY LLP Attorneys for Fourth-Party Defendant-Appellee Bank of Saroda

437 Madison Avenue

New York, New York 10022
(212) 940-3000

Of Counsel:
Constance M. Boland

Moreover, it would be severely prejudicial to the Bank should Trendi be permitted to foist itself upon-this Court for the first time on appeal in this ten-year-old case. If Trendi should raise any new arguments against the Bank on appeal, the Bank will not have an opportunity to create an adequate record to rebut those arguments. To the extent that Trend! may raise the same arguments as Indu Craft, Indu Craft has appealed and is capable of asserting those same arguments to protect its own interests. See, e.g., Powers v. Ohio, 499 U.S. 400, 411 (1991). There is no reason for this Court to read two appellate briefs presenting the same, or similar, arguments, or for the Bank to be forced to rebut the same or similar arguments twice. Permitting Trendi to litigate at this late date will only foster redundancy. Trendi is nothing more than an interloper, "a concerned bystander," Arizonans, 520 U.S. at 65, who lacks standing to appeal.

CONCLUSION

For the foregoing reasons, the Bank respectfully requests this Court to grant its motion and dismiss Trendi's Notice of Appeal.

Dated: New York,
New York June 26, 2000'

NIXON PEABODY LLP

BY :
CONSTANCE M. BOLAND (8900)

Attorneys for Fourth-Party Defendant-Appellee Bank of Baroda
437 Madison Avenue
New York, New York 10022
(212) 940-3000

DOCKET NO. 00-7157

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORAL ARGUMENT REQUESTED

BANK OF INDIA,
Plaintiff,

- against -

TRENDI SPORTSWEAR, Inc.,
Defendant.

TRENDI SPORTSWEAR, INC.,
Third-Party Plaintiff-Appellant,

- against -

INDU CRAFT, INC.,
Third-Party Defendant.

INDU CRAFT, INC.,
Fourth-Party Plaintiff-Appellant,

against -

BANK OF BARODA,
Fourth-Party Defendant-Appellee.

CONSTANCE M. BOLAND, declares under penalty of perjury as follows:

1. I am a member of Nixon Peabody LLP, counsel to fourth-party defendant-appellee Bank of Baroda (the "Bank") in the instant action and counsel to the Bank in

a related action commenced by third-party defendant-fourth-party plaintiff-appellant Indu Craft, Inc. ("Indu Craft") against the Bank. As such, I am familiar with the facts and circumstances of this action and this appeal. I submit this Boland; and the June 2, 2000 e-mail response from Ms. Boland to Mr. Chittur.)

Dated: New York, New York
June 26,.2000

DOCKET NO. 00-7157

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORAL ARGUMENT REQUESTED

BANK OF INDIA,
Plaintiff,

- against -

TRENDI SPORTSWEAR, Inc.,
Defendant.

TRENDI SPORTSWEAR, INC.,
Third-Party Plaintiff-Appellant,

- against -

INDU CRAFT, INC.,
Third-Party Defendant.

INDU CRAFT, INC.,
Fourth-Party Plaintiff-Appellant,

against -

BANK OF BARODA,
Fourth-Party Defendant-Appellee.

DECLARATION OF CONSTANCE M. BOLAND IN SUPPORT OF THE MOTION OF THE BANK OF BARODA TO STRIKE THE BRIEF OF TRENDI SPORTSWEAR, INC.

CONSTANCE M. BOLAND, declares under penalty of perjury as follows:

1. I am a member of Nixon Peabody LLP, counsel to fourth-party defendant-appellee Bank of Baroda (the "Bank") in the instant action and appeal. As such, I am familiar.with the facts and circumstances of this action and this appeal. I submit this declaration in support of the Bank's motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure to strike the brief (the "Brief") served by

Argument and Order of the Court, dated October 5, 1990, annexed hereto as Exhibit C, at 2.) Trendi was not involved in these motions and cross-motions, nor was the relief sought in-those motions and/or cross-motions directed against Trendi. During oral argument, the District Court granted the Bank's motion`to stay the fourth-party action pending resolution of the Prior Action pending between Indu Craft and the Bank. (Id., at 13.) To clarify its ruling, the Court asked "what is left to be done in this case that hasn't been stayed?o (Id., at 14.) Counsel for Indu Craft correctly responded that the third-party claims by Trendi against Indu Craft were "all that's left that's not stayed.'"(Id.)

10. Thus, there was no stay as between Trendi and the Bank of Baroda. Only the fourth-party action was stayed and no other claims were stayed. (Id., at 13-14.) Trendi could have brought an action against the Bank of Baroda, and it could have presented any alleged "subsequently discovered-evidence"against the Bank of Baroda and/or the Bank of India at any time. Trendi failed to do so.

Dated: New York,
New York July 6, 2000

DOCKET NO. 00-7157

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ORAL ARGUMENT REQUESTED

BANK OF INDIA,
Plaintiff,

- against -

TRENDI SPORTSWEAR, Inc.,
Defendant.

TRENDI SPORTSWEAR, INC.,
Third-Party Plaintiff-Appellant,

- against -

INDU CRAFT, INC.,
Third-Party Defendant.

INDU CRAFT, INC.,
Fourth-Party Plaintiff-Appellant,

against -

BANK OF BARODA,
Fourth-Party Defendant-Appellee.

APPELLEE BANK OF BARODA"S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE THE BRIEF AND-IN-OPPOSITION TO APPELLANT TRENDI SPORTSWEAR, INC.'S MOTION TO CONSOLIDATE

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Of Counsel:
Constance M. Boland

POINT II TRENDI'S MOTION TO CONSOLIDATE SHOULD BE DENIED

The Bank opposes Trendi's motion to consolidate to the extent that it conflicts with the Bank's motion to dismiss. The Bank respectfully submits that Trendi's appeal should be dismissed and, therefore, there would be no Trendi appeal to consolidate with the companion appeal brought-by Indu Craft.

CONCLUSION

For the foregoing reasons, the Bank of Baroda respectfully requests this Court to grant the Bank'-s. motion to strike the scandalous material from Trendi's Brief, and dismiss Trendi's motion to consolidate as moot.

Dated: New York, New York August 15, 2000
NIXON PEABODY LLP

ROBERT N:H. CHRISTMAS (RC-6189)
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89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-against-

TRENDI SPORTSWEAR,
Defendant.

March 29, 2002

JUDGMENT

Baroda having moved to dismiss the First Amended Fourth-Party Complaint, and the matter having come before the Honorable John S. Martin, United States District Judge, and the Court, on January 18, 2002, having rendered its Opinion (86491) and Order granting Baroda's motion to dismiss the First Amended Fourth-Party Complaint, and dismissing the First Amended Fourth-Party Complaint, it is,

ORDERED ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (86491) and Order dated January 18, 2002, Baroda's motion to dismiss the First Amended Fourth-Party Complaint is granted, and the First Amended Fourth-Party Complaint is dismissed; accordingly, the case, is closed.

Dated: New York, New York
March 29, 2002

JAMES M. PARKISON
Clerk of Court

By: Deputy Clerk

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §§ 524 (a)(1), (e);[1]
1123(b)(3)(B);[2]
1129(a)(7)(A)(ii)[3]
Rule 14, Fed. R. Civ. P.[4]

---

[1]"(a) A discharge in a case under title-

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived; . . .

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

[2]"§1123. Contents of plan: . . .
(b) Subject to subsection (a) of this section, a plan may–
. . .
(3) provide for–
(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest"

[3]"§1129. Confirmation of plan:
(a) The court shall confirm a plan only if all of the following requirements are met: . . .
(7) With respect to each impaired class of claims or interests–
(A) each holder of a claim or interest of such class–
(i) has accepted the plan; or
(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date".

[4]"When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to

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the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested."

Supreme Court, U.S.
FILED
NOV 0 4 2003
OFFICE OF THE CLERK

Nos. 03-535 & 03-541

IN THE

Supreme Court of the United States

INDU CRAFT, INC.,

Petitioner,

-and-

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF BARODA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Bank of Baroda is incorporated in the Republic of India and 66.26% of its shares are owned by the Government of India. No public company owns 10% or more of its shares.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices viii

COUNTER-STATEMENT OF THE CASE 1

A. The 1987 Action 1

B. The 1989 Action 2

C. The Indu Craft Bankruptcy 3

D. The First Amended Fourth-Party Complaint 7

E. Trendi's "Second Third-Party Complaint" ... 7

THE DECISIONS OF THE COURTS BELOW ... 8

REASONS FOR DENYING THE PETITIONS ... 10

I. SECTION 524(e) HAS NO APPLICATION TO THE CASE AT BAR AND THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY CIRCUIT COURT 12

Contents

Page

II. SECTION 524(e) DOES NOT PREEMPT STATE LAW AS TO THE REQUIREMENTS FOR COMMON LAW INDEMNIFICATION 15

III. THE DECISIONS OF THE COURTS BELOW DO NOT CONSTITUTE A "COLLATERAL ATTACK" UPON ANY ORDER OF THE BANKRUPTCY COURT 17

IV. THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH ANY DECISION OF THE NEW YORK COURT OF APPEALS 20

V. PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT 22

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2d Cir. 2000) 2

Branti v. Finkel, 445 U.S. 507 (1980) 21

Brown v. Northeast Nuclear Engergy Co., 48 F. Supp.2d 116 (D. Conn. 1999) 17

California v. Taylor, 353 U.S. 553 (1957) 15

Celotex Corporation v. Edwards, 514 U.S. 300 (1995) 18

Cheang-Kee v. United States, 70 U.S. 320 (1865) ... 22

Cipollone v. Ligget Group, Inc., 505 U.S. 504 (1992) 16

Green v. Welsh, 956 F.2d 30 (2d Cir. 1992) 13

Indu Craft, Inc. v. Bank of Baroda, 1991 WL 107438, (87 Civ. 7379, S.D.N.Y., June 11, 1991) 1, 3

In re Bergman, 585 F.2d 1171 (2d Cir. 1978) 19

In re Chateaugay Corp., 115 B.R. 760 (Bankr. S.D.N.Y. 1990) 19

In re Clarkson, 767 F.2d 417 (8th Cir. 1985) 19

Cited Authorities

	Page
In re Cole, 189 B.R. 40 (Bankr. S.D.N.Y. 1996) ...	19
In re Continental Airlines, 203 F.3d 203 (3rd Cir. 2000)	13, 14
In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723 (Bankr. S.D.N.Y. 1992)	19
In re Friedberg, 192 B.R. 338 (Bankr. S.D.N.Y. 1996)	19
In re Prudential Energy Co., 58 B.R. 857 (Bankr. S.D.N.Y. 1986)	19
Lawn v. United States, 355 U.S. 339 (1958)	15
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	10
Magnum Imports Co. v. Coty, 262 U.S. 159 (1923) ..	10
Malone v. White Motor Corp., 435 U.S. 497 (1978)	16
National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498 (1951)	21
Project Hope v. M/V IBN SINA, 250 F.3d 67 (2d Cir. 2001)	24

Cited Authorities

Page

Retcal, Inc. v. Insular Lumber Co. (Phil.), Inc., 379 F. Supp. 62 (C.D. Cal. 1973) 23

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 16

Taylor v. Freeland & Kronz, 503 U.S. 638 1644 (1992) 15

Terwilliger v. Terwilliger, 206 F.3d 240 (2d Cir. 2000) 12

Tho Dinh Tran v. The Alphonse Hotel Corp., 281 F.3d 23 (2d Cir. 2002) 22

Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970) 24

Wilson v. Fairchild Republic Co., 143 F.3d 733 (2d Cir. 1998) 22

State Cases

Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473, 497 N.Y.S.2d 890 (1985) 20, 21

Federal Statutes

11 U.S.C § 524(e) ..... *passim*

11 U.S.C. § 1144 ..... 19, 20

Cited Authorities

Page

Rules

Supreme Court Rules, Rule 10 10

Fed. R. Civ. P. 14 ..... 3, 9, 23

Fed. R. Civ. P. 15(a) 9

Treatises

4 William M. Collier, *et al.*, *Collier on Bankruptcy* ¶ 524.05 (2002 ed.) 12

3 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 14.03[2] (3d ed. 2003) 23

TABLE OF APPENDICES

	Page
Excerpts From Disclosure Statement For Second Amended Plan Of Reorganization Of Indu Craft, Inc. Dated November 9, 1998	1a
Excerpts From Transcript Of Hearing Held On October 5, 1990	23a
Transcript Of Bankruptcy Court Hearing Held On December 22, 1998	25a
Joint Statement Of Facts Concerning The Claims Of Trendi Sports-Wear, Inc. And Indu Craft, Inc. Dated June 10, 1999	28a
Decision And Order Resolving Claims Objection Of The United States Bankruptcy Court For The Southern District Of New York Dated July 12, 1999	33a
Final Decree Of The United States Bankruptcy Court For The Southern District Of New York Dated May 17, 2000	36a

Respondent Bank of Baroda (the "Bank") submits this brief in opposition to the petitions of Indu Craft, Inc. ("Indu Craft") and Trendi Sportswear, Inc. ("Trendi") for writs of certiorari to review a Summary Order of the United States Court of Appeals for the Second Circuit which unanimously affirmed the dismissal of Indu Craft's fourth party action for indemnification, and Trendi's "Second Third Party Complaint." Pet. App. at 1a-6a.

Contrary to the assertions of Indu Craft and Trendi, the decisions of the Court of Appeals and the United States District Court for the Southern District of New York are not in conflict with the decisions of this Court, or of any other circuit, raise no novel or important federal question, and provide no compelling reason for review by this Court. Rather, the determinations of the courts below are based upon garden variety common law principles which preclude a claim for indemnification in the absence of a loss, and the settled and salutary rule that precludes the amendment of a pleading long after the expiration of the statute of limitations and the entry of judgment on the underlying claims. Pet. App. at 7a-17a, 18a-36a. Such decisions are undoubtedly correct and should not be disturbed.

COUNTER-STATEMENT OF THE CASE

A. The 1987 Action

The tortured history of this fifteen year-old litigation is detailed in the Summary Order of the Court of Appeals and the Opinions of the District Court dated August 7, 2002 and January 17, 2002 (Hon. John S. Martin), and need not be repeated here. Pet. App. at 1a-6a, 7a-10a, 19a-23a. Suffice it to say that this action is an outgrowth of a 1987 action entitled *Indu Craft, Inc. v. Bank of Baroda*, (87 Civ. 7379 (KTD)) (the "1987 Action") in which Indu Craft asserted various contract

and tort-based claims against the Bank. The case was tried in 1992, and resulted in a verdict in favor of Indu Craft that was ultimately paid in full by the Bank's deposit of the amount of the judgment in an interpleader action.[1] Pet. App. at 20a-21a; Resp. App. at 13a-14a.

B. The 1989 Action

In September 1989, Bank of India ("BOI") commenced an action against Trendi entitled *Bank of India v. Trendi Sportswear, Inc.* (89 Civ. 5996 (JSM)) (the "1989 Action") seeking payment on a promissory note.[2] In May 1990, Trendi filed a third-party action for common law indemnification against Indu Craft, its sister company, claiming that the breach by Indu Craft of a contract to supply goods caused Trendi to default in its obligations to BOI. Rather than move to dismiss Trendi's third-party action as not dependent upon the main claim filed by BOI,

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[1] Like many of the argumentative and unsupported statements contained in the petitions, Indu Craft's assertion that the Bank's interpleader action was "contrived" and somehow "caused Indu Craft to file a Chapter 11 petition for bankruptcy relief" is flatly contradicted by the record. (Indu Craft Br. at 4) As stated by Indu Craft in its Disclosure Statement in support of its proposed Second Amended Plan of Reorganization, "The proximate cause of the decision to seek chapter 11 relief was **the Debtor's inability to consummate a settlement with the IRS**." (Emphasis added) Resp. App. at 14a.

[2] On January 29, 1991, the District Court granted BOI's motion for summary judgment, and on April 24, 1991 a judgment was entered in favor of BOI and against Trendi in the sum of $2,224,895.19. *See Bank of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 433 (2d Cir. 2000). By the time that Indu Craft consented to judgment in favor of Trendi in accordance with the terms of its Plan for Reorganization, the amount of Trendi's third-party claims against Indu Craft had mushroomed to $21,101,348.47. Pet. App. at 21a-22a.

and thus in violation of Fed. R. Civ. P. 14 (Pet. App. at 23a-24a), Indu Craft filed a fourth-party action against the Bank, seeking common law indemnification in the event that it was found liable to Trendi.[3] Pet. App. at 21a.

C. The Indu Craft Bankruptcy

On July 25, 1997, Indu Craft filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York in a proceeding entitled *In re Indu Craft, Inc.* (Bk. No. 97-44958 (JHG)) (the "Bankruptcy Action"). In its Plan of Reorganization (the "Plan"), Indu Craft proposed "payment in full" of all administrative, tax, priority and secured claims from the proceeds of the interpleader action commenced by the Bank, by which the Bank satisfied the judgment entered in the 1987 Action. Resp. App. at 3a. The Plan also contemplated

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[3] In a prior opinion in the 1989 Action, Judge Martin observed that the third-party claims previously asserted by Trendi against Indu Craft appeared to be "manufactured" and were nothing more than the "right pocket" suing the "left pocket." Resp. App. at 23a. That observation that was joined in by Judge Duffy in a prior opinion in the 1987 Action. *See Indu Craft, Inc. v. Bank of Baroda*, 87 Civ. 7379, 1991 WL 107438, at *5, n.2 (S.D.N.Y. June 11, 1991). A similar concern was raised by the Bankruptcy Judge in Indu Craft's subsequent bankruptcy proceeding, in which the Court stated,

> There are lots of things on this plan that are beginning to make me very, very nervous, the way the claims are, the insider problems. This may be a case that would well be served by either a Chapter 11 or Chapter 7 Trustee. If it goes through or not, I think the moment may come to have someone else take a look at this arrangement as it unravels before my eyes.

Resp. App. at 27a.

that the Class 5 subordinated creditors, including Trendi, would also share "pro rata" in the "distribution of the net proceeds of any recovery" in the fourth-party indemnity action ["Baroda II"] commenced by Indu Craft against the Bank.[4] Resp. App. at 8a-9a, 17a.

As detailed in the Plan, the possibility of any recovery by Trendi and the other holders of Class 5 Subordinated Claims was both speculative and remote. Thus, and as stated by Indu Craft in its description of the "Risk Factors" applicable to the Plan, "[t]here can be **no assurance** that the Debtor will recommence the litigation in Baroda II, **or that such litigation**, if commenced **would be resolved in the Debtor's favor**." (Emphasis added) Resp. App. at 17a-18a. Nevertheless, Indu Craft concluded that the Plan was "feasible" and in the best interests of all of its creditors, and recommended its approval.[5] Resp. App. at 2a, 18a, 22a.

As explained by Indu Craft in its disclosure statement, as of the "Effective Date" of the Plan, Indu Craft would be "discharged . . . from all Claims against and Interests in the Debtor" arising prior thereto. Resp. App. at 19a. Both the Plan and the disclosure statements further provided that all persons

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[4] Indu Craft had "ceased operations in November 1987," and the interpleader proceeds constituted its only asset. Resp. App. at 11a.

[5] In explaining why the Plan was "feasible," Indu Craft stated that "it must be demonstrated that consummation of the Plan in not likely to be followed by the liquidation or the need for further financial reorganization of the Debtor." Resp. App. at 18a. Indu Craft concluded that the Plan was "feasible" because it provided for distribution to holders of all "allowed" and "priority" claims from the "Interpleader Proceeds," and because Indu Craft "believes it will be able to make all payments required to be made pursuant to the Plan." Resp. App. at 18a.

or entities having such claims would be "precluded and enjoined" from asserting any such claims "against the Debtor and its successors, assets or properties." Resp. App. at 19a. Finally, all creditors were on notice that the Plan would constitute a "settlement and release" between and among Indu Craft and each of its creditors. Resp. App. at 21a.

On March 24, 1999, Indu Craft filed its Second Amended Plan of Reorganization, As Modified, which was ultimately adopted by Indu Craft's creditors and approved by the Court. Pet. App. at 85a-89a. The treatment of Trendi's unsecured claim was set forth in Article 5, Section 5.2 of the Plan which provided, in the preamble, that "Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan **in full settlement, release and discharge** thereof." (Emphasis added) Pet. App. at 64a. Under the Plan, Trendi and ANZ Sales, Inc. ("ANZ") were to share in the sum of $200,000, to be paid upon confirmation of the Plan, and Trendi, ANZ and Hemant Mehta, as the holders of claims in Class 5, were to share pro rata in the "net proceeds of any recovery" in the fourth-party indemnity action, after deduction of certain funding costs. Pet. App. at 87a-88a.

Article 9 of the Plan, entitled "**DISCHARGE AND RELEASES**," provided that on the "Effective Date," Indu Craft "**shall be discharged** . . . from all Claims against and Interests in Debtor" arising prior to the Effective Date, whether or not the holder of such a claim or interest had filed a proof of claim or had accepted the Plan. (Emphasis added) Pet. App. at 76a-77a. Section 9.1 (b) of the Plan further provided that "all Persons **shall be precluded and enjoined**" from asserting any claim against the Debtor. (Emphasis added) Pet. App. at 77a. In conformity with Section 524 of the Bankruptcy Code, the Plan also provided that "any judgment at any time obtained, to

the extent that such judgment is a determination of the liability of the Debtor with respect to any debt discharged pursuant to the Plan and section 1141(d)(1) of the Bankruptcy Code, **shall be null and void**. . . ." (Emphasis added) (Pet. App. at 77a. The Plan was confirmed by Order of the Bankruptcy Court dated March 29, 1999. Pet. App. at 90a-101a.

Because Trendi had filed a proof of claim in an "unknown amount," the Plan also set forth Indu Craft's agreement to "consent to judgment being entered against it in the third party action . . . for the amount of Trendi's claim as determined by the Bankruptcy Court." Pet. App. at 88a. This was consistent with the terms of a Stipulation and Order Governing Treatment of [Trendi's] Claim In Plan of Reorganization dated March 24, 1999, pursuant to which Trendi and Indu Craft agreed to certain modifications of the Plan, and Trendi agreed to vote in favor of the Plan. Pet. App. at 102a-104a. Pursuant to Section 11.1 of the Plan, the Bankruptcy Court retained jurisdiction to "[a]llow, disallow, determine, liquidate, classify or establish the priority" of any claim, including the determination of the amount of Trendi's claim so that in the event of "any recovery" by Indu Craft in this fourth-party indemnity action, the amount of Trendi's pro rata share of distribution could be ascertained. Pet. App. at 82a.

On June 10, 1999, Indu Craft and Trendi entered into a Joint Statement of Facts regarding Trendi's claim against Indu Craft (the "Joint Statement"). Resp. App. at 28a-32a. Pursuant to the Joint Statement, Indu Craft acknowledged that it had breached its contract with Trendi regarding the purchase and sale of certain garments. Resp. App. at 28a-32a. Indu Craft also consented to $20,480,275.04 of Trendi's proposed damage claim of $21,101,348.47. Resp. App. at 34a.

By Decision and Order dated July 12, 1999, the Bankruptcy Court fixed the amount of Trendi's claim as $21,101,348.47, the full amount sought by Trendi. Resp. App. at 33a-35a. On January 18, 2000, a final judgment in that amount was entered in favor of Trendi (the "Trendi Judgment").[6] Pet. App. at 45a. On May 17, 2000, a Final Decree was entered in the Bankruptcy Action, pursuant to which Indu Craft was "discharged and released from any and all claims of creditors," and the Chapter 11 Case was closed. Pet. App. at 3a, 9a; Resp. App. at 36a-37a.

D. The First Amended Fourth-Party Complaint

On March 29, 2001 – more than 10 years after the commencement of the 1989 Action – Indu Craft served an amended fourth-party complaint, purportedly as of right, to recover in indemnity for the amount of the Trendi Judgment. In addition to its prior claims for common law indemnity, Indu Craft also asserted new claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Pet. App. at 5a, 31a. The Fourth-Party Complaint was dismissed by Final Judgment entered April 11, 2002. Pet. App. at 8a.

E. Trendi's "Second Third-Party Complaint"

On July 30, 2001 – more than one-and-half years after the entry of the Trendi Judgment and some 14 years after the events giving rise to the 1987 Action – Trendi filed what purported to be a "Second Third Party Complaint," seeking for the first time

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[6] By any standard, the Trendi Judgment was collusive in nature. As found by the District Court, the Trendi Judgment "was entered pursuant to a stipulation in a context in which Indu Craft . . . had no incentive to litigate the amount of damages." Pet. App. at 28a.

to assert direct claims against the Bank. Pet. App. at 10a. Trendi did so without leave of court, and despite the fact that it lacked standing because it was no longer a party to the pending 1989 Action. Following the granting of the Bank's motion to dismiss the fourth party action, Trendi made an application to vacate the Final Judgment, which was denied. Pet. App. at 8a-17a.

THE DECISIONS OF THE COURTS BELOW

In dismissing Indu Craft's fourth party claims for indemnification, the courts below held that because Indu Craft sought indemnity with respect to a consent judgment rendered in favor of Trendi, its affiliate, but had received a complete discharge and release in bankruptcy from all claims of all of its creditors, including Trendi, Indu Craft had not suffered, and could not suffer, any cognizable loss and its claims for indemnity were legally insufficient. Pet. App. at 24a-27a. In reaching this conclusion, the District Court stated that it was "black letter law" that "an indemnification claim does not arise until the party seeking indemnification has an out-of-pocket loss to be reimbursed," and that the law "does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss." Pet. App. at 24a, 27a. Because Indu Craft had been discharged from any obligation to pay Trendi, and Trendi was barred by the Plan from seeking to enforce the Trendi Judgment, except to the extent of any recovery in this action, the lower courts held that Indu Craft's indemnity claims could not succeed as a matter of law. Pet. App. at 25a.

The courts below further held that Indu Craft's claims under RICO were also barred by both *res judicata* and the four-year RICO statute of limitations. Pet. App. at 31a-34a. Because Indu Craft's First Amended Fourth Party Complaint alleges that all of the acts complained of occurred between 1984 and 1990,

Indu Craft was on inquiry notice of such claims "at the time that the 1987 Action was tried in 1992. . . ." Pet. App. at 31a-32a. The lower courts also rejected Indu Craft's contention that its RICO claims did not arise until the time of the Trendi Judgment, holding that the "injury, if any, took place when Indu Craft was originally 'exposed to civil liability'" as a result of the filing of Trendi's third-party complaint in 1990. Pet. App. at 33a.

With respect to the claims asserted by Trendi, the courts below held that Trendi's self-styled "Second Third Party Complaint" was not an amended pleading within the meaning of Fed. R. Civ. P. 15(a), but was an independent third party complaint pursuant to Fed. R. Civ. P. 14. Pet. App. at 12a-13a. Accordingly, Trendi had no right to amend its third party complaint with respect to claims previously asserted, and which had resulted in the entry of a final judgment in favor of Trendi and against Indu Craft on January 18, 2000. In a word, it was simply too late, in 2002, for Trendi to attempt to assert direct claims against the Bank which arose in 1987, and which Trendi elected not to assert for 14 years. Pet. App. at 12a-15a.

Finally, the District Court explicitly rejected Trendi's contention that the court, in its prior opinion dismissing the fourth-party action, had held that the Trendi Judgment was "null and void," stating that "the Court never questioned the validity of the Bankruptcy Court's judgment." Pet. App. at 14a. Rather, the Court explained that it "merely held that Indu Craft's indemnification claim . . . failed to state a cause of action as a matter of New York law," and that Trendi's agreement to limit recovery on the Trendi Judgment to the proceeds, if any, of Indu Craft's fourth-party indemnity claims against the Bank "would preclude Trendi from collecting on its judgment." Pet. App. at 14a. The Court concluded by stating that

"[w]hile Trendi may well have made an ill-advised agreement, which did not take adequate account of New York law regarding indemnification, that agreement was, nevertheless, the basis upon which the judgment of the Bankruptcy Court was entered," and which "has not been set aside."[7] Pet. App. at 14a.

REASONS FOR DENYING THE PETITIONS

Petitioners have not met, and cannot meet, their heavy burden of demonstrating the existence of "compelling reasons" warranting review on a writ of certiorari. Sup. Ct. R. 10. As held by this Court in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), petitions for certiorari will only be granted "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." In the words of Chief Justice Taft in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923), certiorari jurisdiction is "not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

In support of their petitions, neither Indu Craft nor Trendi addresses, let alone challenges, the black-letter law upon which Indu Craft's common law indemnity claims were held to be legally insufficient, its RICO claims were held to be barred by *res judicata* and the four-year RICO statute of limitations, and Trendi's "Second Third Party Complaint" was held to be time-

[7] Substantially all of the arguments raised by Indu Craft and Trendi in its Petitions to this Court were made to and rejected by the Courts below. In unanimously affirming the orders of the District Court, the Court of Appeals did so by Summary Order, rather than by opinion. Nevertheless, Indu Craft and Trendi moved for rehearing and rehearing *en banc*, which was denied by Order dated July 7, 2003.

barred. Instead, Indu Craft urges that (a) the decisions below somehow violate Section 524(e) of the Bankruptcy Act, 11 U.S.C § 524(e); (b) Section 524(e) "abrogates" the common law rule requiring payment as a condition to recovery in indemnity; and (c) a "conflict" supposedly exists in the circuit courts regarding the interpretation of Section 524(e). Both Indu Craft and Trendi also claim that the decisions below constituted an impermissible "collateral attack" upon Indu Craft's reorganization plan. Finally, Trendi urges that to the extent that the courts below held that Trendi's belated "Second Third Party Complaint" did not relate back to the filing of its original third-party action, such decisions are somehow in conflict with a decision of the New York Court of Appeals.

The arguments advanced by Indu Craft and Trendi are without merit for at least the following reasons. First, (a) Section 524(e) of the Bankruptcy Code is irrelevant to any of the issues raised in the courts below; (b) there is no conflict regarding Section 524(e) and the decisions of any of the circuit courts; and (c) Section 524(e) does not abrogate or preempt the common law rules which require a loss as a condition to recovery in indemnity. Second, the determination of the courts below that Indu Craft suffered no loss, and that its claims for indemnification were legally insufficient, was not a "collateral attack" upon the Plan or any order of the Bankruptcy Court. Third, the decisions below are not in conflict with any decision of the New York Court of Appeals. Finally, and in any event, none of the arguments advanced by Indu Craft and Trendi warrants review by this Court.

I. SECTION 524(e) HAS NO APPLICATION TO THE CASE AT BAR AND THE DECISIONS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY CIRCUIT COURT

Section 524(e) of the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity . . . for . . . such debt." Pet. App. at 131a. The Bank has never relied upon or otherwise claimed the benefit of Section 524(e), and has never asserted that Indu Craft's discharge in bankruptcy resulted in a discharge of Indu Craft's indemnity claims against the Bank. Rather, the Bank contends, and the courts below held, that the legal effect of Indu Craft's discharge in bankruptcy was to prevent Indu Craft from suffering any loss arising from the Trendi Judgment and that, as a result, "Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed." Pet. App. at 25a.

As is clear from the legislative history of Section 524(e), the purpose of that statute was to prevent a debtor's discharge in bankruptcy from affecting the liability of a co-debtor or guarantor on the underlying debt. 4 William M. Collier *et al.*, *Collier on Bankruptcy* ¶ 524.05, n.2 (2002 ed.) *See also Terwilliger v. Terwilliger*, 206 F.3d 240, 247-48 (2d Cir. 2000). Here, the Bank is neither a "co-debtor" nor a "guarantor" of any obligation that Indu Craft may have had to Trendi, and Indu Craft's discharge in bankruptcy had no effect upon Indu Craft's burden to demonstrate the existence of a loss as a condition to asserting a valid claim for indemnity against the Bank. It is not the Bank which seeks to obtain any benefit from Section 524(e), but Indu Craft, which impermissibly seeks to use that statute in order to breathe life into a claim for indemnification that is bereft of merit.

Indu Craft's reliance upon *Green v. Welsh*, 956 F.2d 30 (2d Cir. 1992), is misplaced. *Green* and its progeny involve a narrow exception to the "fresh start" objective of the Bankruptcy Code and the discharge provisions of Section 524, which permit a creditor to proceed against a discharged debtor "solely to establish liability, as a prerequisite to recovery, permitted by state law, from an insurer or other surety." Pet. App. at 27a. This exception has nothing to do with the salient principle that "New York State law does not permit recovery on an indemnity claim where the party seeking indemnification has not suffered an out of pocket loss." Pet. App. at 27a.

For the rule in *Green* to apply, Trendi would have to sue Indu Craft in a post-discharge proceeding in order to establish Indu Craft's liability as a prerequisite to pursuing a claim against the Bank. However, the Bank in not an insurer or surety of Trendi's claims against Indu Craft, Trendi already obtained a judgment against Indu Craft and it was not Trendi, but Indu Craft, that sought to rely upon the narrow exception to Section 524(e), an exception that is intended to benefit creditors and not debtors such as Indu Craft. Simply put, Indu Craft is seeking to turn Section 524(e) on its head in order to circumvent the black letter law which prohibits any recovery in indemnity in the absence of an out-of-pocket loss.

Nor is there any "conflict" in the circuits regarding any interpretation of Section 524(e) that is applicable to the facts of this case. Indu Craft's claim of "conflict" is based upon the Third Circuit's decision in *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000), a case in which the Court considered the validity of a clause in a plan of reorganization that provided for the release of third party claims, and a permanent injunction

against third party actions, against the officers and directors of the debtor. The Court held that the release and injunction provisions before it were legally unsupportable. *Id.* at 214.

In reaching this conclusion, the Court reviewed the decisions of various circuit courts which had previously considered the issue of the effect of Section 524(e) upon the validity of release and injunctive provisions regarding non-debtors in a plan of reorganization. *Id.* at 212-13. However, in none of those cases did any of the courts state that any "conflict" existed among the various decisions. Rather, and as noted by the Court in *Continental*, these decisions were fact intensive, were based upon the specific language of the particular plans under review, and did not establish a "blanket rule" regarding the validity of such release and injunctive provisions.

Regardless of the decisions reached by the courts in *Continental* and related cases, such cases have no possible bearing on the petitions for certiorari before this Court. Indu Craft's plan of reorganization contained no provision for the release of any non-debtors, the Bank has never made any claim in reliance upon Section 524(e), and the courts below did not base their decision to dismiss Indu Craft's indemnity claims upon Section 524(e). Indu Craft's attempt to use Section 524(e) to cast doubt upon the validity of the decisions below is a classic bootstrap argument that seeks to create an issue where none exists, and certainly does not demonstrate the existence of any "conflict" or compelling issue sufficient to warrant review by this Court.

II. SECTION 524(e) DOES NOT PREEMPT STATE LAW AS TO THE REQUIREMENTS FOR COMMON LAW INDEMNIFICATION

In support of its petition for a writ of certiorari, Indu Craft urges for the first time that the common law requirements for a claim of indemnification have been preempted by Section 524(e) of the Bankruptcy Code. (Indu Craft Br. at 17-18) However, Indu Craft never raised this argument in any of the courts below, and neither the District Court nor the Court of Appeals ever passed on this issue. Indu Craft is precluded from raising this issue before this Court.

It is axiomatic that the Supreme Court does not ordinarily decide questions that have not been raised or resolved by the lower courts. *Lawn v. United States*, 355 U.S. 339, 362-263, n.16 (1958); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). As stated by the Court in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992), this is one of the principles that "help to maintain the integrity of the process of certiorari." Accordingly, Indu Craft's claim of preemption should not be considered as part of its petition for a writ of certiorari.[8]

Separate and apart from the foregoing, the contention that Section 524(e) has abrogated or preempted the common law rule that requires payment as a condition to a claim for indemnification is meritless. As acknowledged by Indu Craft, Section 524(e) contains no language of preemption, and there is nothing in Section 524(e) that would remotely indicate any

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[8] Indu Craft's contention that the Bank lacks "standing" to raise any argument based upon the legal effect of Indu Craft's discharge in bankruptcy is another argument that was never raised below and should not be considered by the Court. (Indu Craft Br. at 24)

intent on the part of Congress to preempt any aspect of the state law of indemnification. Simply stated, neither the fresh start objective of the Bankruptcy Code, nor the provisions of Section 524(e), have any possible bearing on the settled principal that a party seeking indemnity cannot recover in the absence of proof that it has suffered a loss. Pet. App. at 24a-27a.

Consideration of whether a federal law pre-empts state law, "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). In the absence of express preemption, there can by no preemption of state law unless "that [state] law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" [citations omitted] *Id.*

Any contention that Section 524(e) preempts the payment rule of state indemnity law is not supported by the language, structure, or purpose of the Bankruptcy Code. The common law payment rule as applied to indemnity claims has nothing to do with the limited objective of Section 524(e) of preserving the liability of non-debtors who are jointly liable for the obligation of a debtor that is discharged in bankruptcy. Conversely, there is nothing in either the statutory language of

Section 524(e), or its legislative history, that would evidence any possible legislative concern regarding any common law claims of indemnity. *See, e.g., Brown v. Northeast Nuclear Energy Co.*, 48 F. Supp.2d 116, 120 (D. Conn. 1999) (no preemption of common law claims for breach of contract and tort, by field of federal nuclear safety legislation, where state law claims were "not motivated by an objective of regulating nuclear safety.")

Finally, the requirement of payment as a condition to a claim for indemnification does not create any conflict with the purpose of Section 524(e). It is not the fact of Indu Craft's discharge in bankruptcy, but the legal consequences of that discharge on Indu Craft's claims for indemnification that rendered such claims legally insufficient. That result has nothing whatsoever to do with Section 524(e).

III. THE DECISIONS OF THE COURTS BELOW DO NOT CONSTITUTE A "COLLATERAL ATTACK" UPON ANY ORDER OF THE BANKRUPTCY COURT

Contrary to the assertions of Indu Craft and Trendi, the determination of the courts below that Indu Craft's discharge and release in bankruptcy constituted a legal bar to Indu Craft's claims for indemnification is not a "collateral attack" upon any order of the bankruptcy court, let alone a "nullification" of Indu Craft's reorganization Plan. (Indu Craft Br. at 22-23, Trendi Br. at 11-14) At no time did the Bank ever challenge or seek to set aside the validity of any aspect of the Plan, and the decisions below contain no finding that any aspect of the Plan was invalid. Indeed, the same argument was rejected by the courts below, with the District Court explaining that in dismissing Indu Craft's fourth-party action, the Court "never

questioned the validity of the Bankruptcy Court's judgment," but "merely held that Indu Craft's indemnification claim . . . failed to state a cause of action as a matter of New York law." Pet. App. at 14a.

This Court's decision in *Celotex Corporation v. Edwards*, 514 U.S. 300 (1995), underscores the fact that the Bank's defense to the indemnification claims asserted by Indu Craft did not constitute a "collateral attack" upon any order of the Bankruptcy Court. In *Celotex*, this Court reversed a decision of the United States Court of Appeals for the Fifth Circuit, which held that respondents were entitled to execute upon a supersedeas bond posted to secure a final judgment, despite the fact that the bankruptcy court had issued an injunction prohibiting any execution on the bond without further court order. Granting certiorari to resolve a conflict between the circuit courts, this Court held that by obtaining an injunction in the Texas district court, respondents had engaged in an impermissible collateral attack upon the injunction issued by the bankruptcy court, from which no appeal had been taken. 514 U.S. at 313.

Here, it is Indu Craft and Trendi which seek to "collaterally attack" their own plan of reorganization by engaging in inventive interpretations which fly in the face of the plain language of the Plan. Thus, Indu Craft continues to argue that Trendi's claim against Indu Craft was never discharged, despite the express language of the Section 9.1 of the Plan that upon the effective date thereof, "the Debtor **shall be discharged** . . . from all Claims against and Interests in the Debtor that arose prior to the Effective Date . . . ," and Section 5.2 of the Plan, which provides that "Allowed Claims in Classes 4 and 5 are impaired and shall receive the following treatment under the Plan **in full settlement, release and discharge thereof**." (Emphasis added) Pet. App. at 77a, 64a. Similarly, Indu Craft's assertion that the

holdings of the courts below somehow impair the "feasibility" of the Plan is contrary to law, and is equally belied by its admission in its Disclosure Statement that the Plan was "feasible" and in the best interests of all of its creditors.[9] Resp. App. at 18a.

Indu Craft's contention also rests upon a fundamental misconception regarding the treatment of a claim in bankruptcy. Pursuant to § 1141(d)(1)(A) of the Bankruptcy Code, the confirmation of a debtor's Chapter 11 plan of reorganization "discharges the debtor from any debt that arose before the date of such confirmation. . . ." *In re Chateaugay Corp.*, 115 B.R. 760, 773 (Bankr. S.D.N.Y. 1990). Consistent with the foregoing, the effect of confirmation of a plan of reorganization is to extinguish all allowed or allowable claims, which are exchanged for the right to participate in and receive any benefits of that plan. *In re Friedberg*, 192 B.R. 338, 341 (Bankr. S.D.N.Y. 1996). As explained by the court in *In re Cole*, 189 B.R. 40, 45 (Bankr. S.D.N.Y. 1996), "the creditor's underlying claim is extinguished by confirmation of the plan with the debtor's obligation to comply with the terms of the confirmed plan being substituted for the underlying claim."

By voting in favor of the Plan, Trendi agreed to limit any recovery on the Trendi Judgment to its pro rata share of the

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[9] A finding that a plan of reorganization is feasible is not a guarantee of success. *In re Prudential Energy Co.*, 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986). Rather, the "key element of feasibility is whether there exists the reasonable probability that the provisions of the Plan can be performed." *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 723, 762 (Bankr. S.D.N.Y. 1992); *see also In re Clarkson*, 767 F.2d 417, 420 (8th Cir. 1985) (quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)). As explained by the Court in *In re Drexel Burnham Lambert Group*, "speculative prospects of failure cannot defeat feasibility . . . since a guarantee of the future is not required." 138 B.R. at 762.

proceeds, if any, of any judgment obtained by Indu Craft on its fourth-party claims for indemnification against the Bank. Pet. App. at 14a, 102a-104a. However, because Trendi's claim against Indu Craft was settled, released and discharged, Indu Craft has not suffered, and cannot possibly suffer, any loss for which a claim for indemnity would lie. Having drafted the Plan and the discharge and release provisions contained therein, it is simply too late for Indu Craft, with the aide of Trendi, its sister company, now to attempt to rewrite those provisions in a manner more to its liking.[10]

IV. THE DECISIONS OF THE COURTS BELOW DO NOT CONFLICT WITH ANY DECISION OF THE NEW YORK COURT OF APPEALS

Seeking to create a conflict where none exists, Trendi urges that the decisions below dismissing its "Second Third Party Complaint" somehow conflict with the decision of the New York Court of Appeals in *Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473, 497 N.Y.S.2d 890 (1985). In *Duffy*, the New York Court of Appeals held that an amended complaint against a third-party defendant, with actual notice of plaintiff's potential claims, would relate back to the time of the filing of the original complaint. As stated by the Court, where "a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, . . . permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations." 66 N.Y.2d at 477, 497 N.Y.S.2d at 893.

[10] Pursuant to Section 1144 of the Bankruptcy Code, a party seeking to revoke an order of confirmation must do so within "180 days after the date of the entry of the order of confirmation." Here, the Plan was confirmed by Order of the Bankruptcy Court dated March 29, 1999. Pet. App. at 90a-101a.

The facts in *Duffy* are not remotely similar to facts of this case and serve only to underscore the correctness of the decisions below dismissing Trendi's belated pleading in its entirety. Unlike the plaintiff in *Duffy*, Trendi never sought to amend its pleading, but simply asserted direct claims against the Bank, purportedly as a matter of right, long after its third-party claims had been fully adjudicated and merged into a final judgment, and long after the expiration of all applicable statutes of limitation. Unlike the third-party defendant in *Duffy*, the Bank had no notice that it would be subjected to claims by Trendi that arose some **15 years** earlier, and which Trendi deliberately failed to assert despite having had every opportunity to do so.

The decision in *Duffy* is not only fact-intensive, but involves facts that are far different from those presented in the instant case. To the extent that petitioners seek to alter or challenge factual determinations reached by the courts below, such matters are not properly within the scope of review by this Court.[11] In the absence of extraordinary circumstances, it is the "settled practice" of this Court to accept "factual determinations in which the district court and the court of appeals have concurred." *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 501 (1951).

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[11] Without the benefit of citation to the record, Trendi asserts that the Bank "had 'actual notice' of Trendi's claims when [the Bank] was impleaded in 1990." (Trendi Br. at 24) The record facts are otherwise. Until July 30, 2001, when Trendi filed its "Second Third Party Complaint" seeking for the first time to assert direct claims against the Bank, the only claims ever asserted by Trendi were the third-party claims that it asserted against its sister company, Indu Craft. Pet. App. at 2a-5a, 10a. Trendi made the same argument in the courts below, and although such courts did not specifically rule on Trendi's false claim of "notice," such claim was implicitly rejected by the refusal to allow Trendi's self-styled pleading to relate back to May, 1990, the time of its original third-party claims against Indu Craft.

Finally, the standard of review of a determination not to permit a new or amended pleading to relate back to the date of the original pleading is an abuse of discretion. *Wilson v. Fairchild Republic Co.*, 143 F.3d 733, 738 (2d Cir. 1998); *See also Tho Dinh Tran v. The Alphonse Hotel Corp.*, 281 F.3d 23, 26-27 (2d Cir. 2002). Whether or not the decisions below regarding the relation back of Trendi's "Second Third Party Complaint" constituted an abuse of discretion is not a matter that is subject to review by this Court. *Cheang-Kee v. U.S.*, 70 U.S. 320, 326 (1865). Accordingly, no further review of the determinations of the courts below dismissing Trendi's belated and untimely pleading is warranted.

V. PETITIONERS' REMAINING ARGUMENTS ARE WITHOUT MERIT

Virtually every argument advanced by petitioners rests upon a false or misleading premise, or is otherwise based upon a misinterpretation of facts that is beyond the proper scope of review by this Court. For example, petitioners' entire argument regarding Section 524(e) of the Bankruptcy Code is based upon the erroneous notion that the decisions below "effectively granted a non-debtor discharge" to the Bank in violation of Section 524(e). (Indu Craft Br. at 8) Petitioners' mischaracterization of the decisions of the courts below falls far short of the heavy burden they are required to meet in order to demonstrate the existence of a compelling reason sufficient to warrant review by this Court.

Similarly, Trendi's contention that the decisions below create a compelling issue regarding the statute of limitations applicable to its "Second Third Party Complaint" is plainly erroneous. Far from creating "three different statutes of limitation for the same claim," the decisions below applied

settled and incontrovertible legal principles to dismiss a pleading which Trendi had no standing to file, and which was plainly time-barred under the most generous of limitation periods. (Trendi Br. at 25) Trendi's misunderstanding of these principles provides no basis for review by this Court.[12]

As stated by the District Court, pursuant to Fed. R. Civ. P. 14(a), Trendi was "fully advised" of Indu Craft's claims against the Bank and, as a defendant and third-party plaintiff in the 1989 Action, could have filed a direct claim against the Bank at any time between the filing by Indu Craft of its fourth party action on June 21, 1990 and the entry of Final Judgment by the Bankruptcy Court on January 18, 2000. Pet. App. at 14a-15a. However, Trendi was required to do so "before the statute of limitations has run." Pet. App. at 12a. For reasons that "remain[] unexplained," Trendi, simply failed to do so. Pet. App. at 15a.

Trendi's reliance upon the cases cited at page 26 of its brief is equally misplaced. Unlike the facts found by the courts below, these cases involved situations in which third-party defendants

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[12] By its terms, Rule 14 only applies to parties to a pending action, and "only defending parties may implead." 3 James Wm. Moore, *et al.*, *Moore's Federal Practice* § 14.03[2] (3d ed. 2003) Thus, only a "defending party" may commence a third-party action, only a "third-party defendant" may assert claims against the plaintiff or any person who is not a party "who is or may be liable to the third-party defendant" for the claims asserted against him, and only a "plaintiff" may assert claims directly against the third-party defendant. Fed R. Civ. P. 14(a). Once the third-party action was terminated by the entry of judgment in favor of Trendi, Trendi was no longer a "party," let alone a "defending party," to the third-party action, and lacked standing to assert any third-party claims against the Bank. *Retcal, Inc. v. Insular Lumber Co. (Phil.), Inc.*, 379 F. Supp. 62, 64 (C.D. Cal. 1973) (persons who were neither defendants, defending parties, nor claimants were not authorized to file third-party action under Rule 14).

had actual notice that the plaintiffs were proceeding directly against them, and actually defended against plaintiffs' claims without objection, despite the fact that no formal claim had ever been asserted by plaintiffs directly against such third-party defendants.[13] Again, Trendi's reliance upon these cases rests upon its unilateral and unsupported assertion that the Bank was "effectively on notice" of Trendi's claims, an assertion that was made and implicitly rejected by the courts below.

Finally, and without the benefit of any authority, Indu Craft urges that this Court should exercise its "supervisory powers" in order to give effect to the Trendi Judgment, despite the plain language of the Plan which discharges Indu Craft from any liability on Trendi's underlying claim except to the limited extent provided for in the Modified Plan. (Indu Craft Br. at 25-27) In making this argument, Indu Craft erroneously asserts that the decisions below were fundamentally inconsistent in that they purportedly held that the Trendi Judgment, although not void, was not required to be paid by Indu Craft. (Indu Craft Br. at 25) Once again, Indu Craft's baseless attack upon the decisions of the courts below provides no conceivable basis for review by this Court.

Contrary to petitioners' rhetorical assertions, the decisions below are neither inconsistent, contradictory, conflicting, illogical, unfair or, in the words of Trendi, "schizophrenic." (Indu Craft Br. at 25-26, Trendi Br. at 22) Rather, such decisions rest upon the fundamental and irrefutable rule that a party may not recover in indemnity in the absence of a loss. As held by the courts below, and as a result of Indu Craft's discharge in bankruptcy, Indu Craft had not suffered, and could not suffer, any loss for which a claim for indemnity would lie.

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[13] *See Project Hope v. M/V IBN SINA*, 250 F.3d 67 (2d Cir. 2001), and *Wasik v. Borg*, 423 F.2d 44 (2d Cir. 1970).

Simply put, the indemnity claims asserted by Indu Craft in its fourth-party action, and the direct claims belatedly asserted by Trendi in its "Second Third Party Complaint," are a sham. If Trendi and Indu Craft were truly at arms-length, it is inconceivable that Indu Craft, having received a full discharge and release in bankruptcy, would invest the time, effort and expense to pursue a claim for indemnity with respect to a collusive judgment which it cannot pay, has no obligation to pay, and as to which it has not suffered, and will never suffer, any loss. The decisions of the courts below were correct, petitioners have failed to demonstrate any basis for review by this Court, and the time has come to bring this Dickensian litigation to an end.

CONCLUSION

For each of the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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EXCERPTS FROM DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN OF REORGANIZATION OF INDU CRAFT, INC. DATED NOVEMBER 9, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No. 97 B 44958 (JHG)

In re

INDU CRAFT, INC. Taxpayer I.D. No. 13-3048561,

Debtor.

DISCLOSURE STATEMENT FOR SECOND AMENDED PLAN OF REORGANIZATION OF INDU CRAFT, INC.

Dated: New York, New York
November 9, 1998

SUMMARY

The debtor, Indu Craft, Inc. (the "Debtor") has filed its *Second Amended Plan of Reorganization of Indu Craft, Inc.*, dated November 9, 1998 (the "Plan"), with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). This *Disclosure Statement for Second Amended Plan of Reorganization of Indu Craft, Inc.* (the "Disclosure Statement") has received the approval of the Bankruptcy Court for use in connection with the

solicitation of acceptances of the Plan from holders of Claims against and Interests in the Debtor pursuant to section 1125 of title 11 of the United States Code (the "Bankruptcy Code").

A glossary of terms frequently used in this Disclosure Statement is set forth in Article 1 of the Plan.

In the Debtor's opinion, the treatment of Claims and Interests under the Plan provides a greater recovery than that which is likely to be achieved under other alternatives for the reorganization or liquidation of the Debtor.

Accordingly, the Debtor believes that Confirmation of the Plan is in the best interests of Creditors and Interest Holders and recommends that you vote to accept the Plan.

The Debtor

The Debtor is a corporation organized and existing under the laws of the State of New York having an address at P.O. Box 316, New York, New York 10018-0136. The Debtor's President and sole director is Hemant Mehta ("Mehta"). The Debtor's sole shareholder is Tze Wung Consultants, Ltd. ("Tze Wung"), a Hong Kong corporation maintaining offices for the conduct of business at Manulife Towers, 7th Floor, 169 Electric Road, Hong Kong.

The Debtor had been in the business of importing ladies' sportswear for sale at retail and wholesale. As set forth in more detail below, the Debtor's business was destroyed by the bad faith refusal of the Debtor's lender, Bank of Baroda, to continue extending credit to the Debtor on commercially

reasonable terms after the Debtor refused to invest in a business venture belonging to the son of an officer of Bank of Baroda.

Bank of Baroda's bad faith actions resulted in the closure of the Debtor's business and ultimately resulted in the issuance of a judgment against Bank of Baroda in the Debtor's favor in the amount of $2,519,822.29 on July 31, 1996.

* * *

Accordingly, to protect the interests of its Creditors and Interest Holders, the Debtor filed its voluntary petition commencing this case under chapter 11 of the Bankruptcy Code on July 25, 1997.

The Plan

The Plan provides for the payment in-full of all administrative, priority tax and secured claims and holders of Allowed Claims in Class 3 and 4 from the Interpleader Proceeds. Additionally, the Plan provides for the contribution by Tze Wung of up to $200,000 to enable the Debtor to fund post-confirmation claims of the Debtor, the proceeds of which will be used to pay holders of Allowed Claims in Class 5 (Subordinated Claims). The Plan categorizes the Claims against and Interests in the Debtor into various classes. The Plan also provides that the reasonable fees and expenses incurred by the Debtor during the Case will be paid in full and specifies the manner in which each class of Claims and Interests is to be treated.

Appendix

The Debtor's sole Interest Holder, Tze Wung, will retain its interests in the Debtor in exchange for the New Capital Contribution.

The table below provides a summary of the classification and treatment of Claims and Interests under the Plan. The figures set forth in the table below represent the Debtor's best estimate of the total amount of Allowed Claims and Allowed Interests in the Case. These estimates have been developed by the Debtor based on an analysis of its books and records and the proofs of claim filed in the case. The Bankruptcy Court set September 8, 1997, as the last date for filing Proofs of Claims and Proofs of Interests filed with the Bankruptcy Court by Creditors and Interest Holders. See "SIGNIFICANT EVENTS IN THE CASE — Bar Date." There can be no assurance that the amount of Claims and Interests that may be filed and allowed by the Bankruptcy Court will not exceed the amounts set forth below:

Class and Estimated Amount	**Type of Claim or Equity Interest**	**Summary of Treatment**
$140,000.00	Administrative Claims (including Claims for Professional Compensation and Reimburse-ment, Post-petition Ordinary Course Liabilities and	**Unimpaired.** Each Adminis-trative Claim, to the extent not previously paid, shall be paid by the Disbursing Agent, in Cash, in full on (i) the later of the Effective Date, the date payment of such Claim is due under the terms thereof or applicable law, or three

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
	Post-petition Tax Claims)	business days after such Claim becomes an Administrative Claim or (ii) as may be otherwise mutually agreed in writing between the Disbursing Agent and the holder of such Claim; *provided, however*, that any Administrative Claim incurred by the Debtor in the ordinary course of its business shall be paid in full or performed by the Debtor in accordance with the terms and conditions of the particular transaction giving rise to such Administrative Claim and any agreements relating thereto.
152,385.00[1]	Priority Claims and Priority Tax Claims	**Unimpaired.** Subject to the provisions of Article 8 of the Plan, all Allowed Claims of

1. This number is comprised of: (i) NYC's Claim, in the amount of $12,385.00; (ii) NYS' Claim, in the amount of $15,000.00 and Vinod Gaglani's Claim, in the amount of $125,000.00. The Debtor has filed a motion seeking to expunge Vinod Gaglani's Claim. To the extent that Vinod Gaglani has a claim in excess of $15,000.00, the amount of his claim above $15,000.00 will be treated in Class 5.

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		Governmental Units entitled to priority pursuant to section 507(a)(8) of the Bankruptcy Code, and other holders of Allowed priority claims shall be paid, in Cash, in full on the Effective Date.
Class 1 $635,000	EVW Secured Claim	**Unimpaired.** In full satisfaction of the EVW Secured Claim against the Debtor, if any, EVW shall receive the treatment accorded to it under the Stipulation and Consent Order Resolving Claims of Eaton & VanWinkle and Providing Relief from the Automatic Stay, a copy of which is annexed to the Plan as Exhibit "A" and the terms of which are incorporated by reference therein.
Class 2 $112,300.31[2]	IRS Interest Claim	**Unimpaired.** Subject to the provisions of Article 8 of the

2. In its amended proof of claim (Claim # 16), IRS asserts a claim for interest and interest on interest in the amount of $112,300.31. This claim is the subject of a motion objecting to such claim. The motion is returnable on December 10, 1998.

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		Plan with respect to Disputed Claims, in full satisfaction of the IRS Interest Claim against the Debtor, if any, the IRS shall receive payment in cash, in the amount of one hundred percent (100%) of its Allowed Interest Claim.
Class 3 $ 11,056.75	Unsecured Claims	**Unimpaired.** Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of Administrative Claims. Priority Claims, and Trustee Fees, if any, each holder of an Unsecured Claim shall be paid, in cash, in full on the Effective Date.
Class 4 $620,000.00[3]	Tze Wung Secured Claim	**Impaired.** Subject to the provisions of Article 8 of the Plan with respect to Disputed

3. Tze Wung had filed a claim, in the amount of $1,820,000.00. However, by order of the bankruptcy court dated June 22 (the "June 22 Order") this Court authorized the Debtor to remit the sum of $1,200,000.00 to Tze Wung, thus reducing its claim to $620,000.00.

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		Claims, on the Effective Date and as soon as practicable following the resolution and payment to holders of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2 and 3, and Trustee Fees; the holder of an Allowed Claim in Class 4 shall receive its Pro Rata Distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, and holders of Allowed Claims inClasses 2 and 3).
Class 5 Unknown	Subordinated Claims	**Impaired.** Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of holders of Allowed Administrative Claims,

Appendix

Class and Estimated Amount	Type of Claim or Equity Interest	Summary of Treatment
		holders of Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4, and United States Trustee Fees; holders of Allowed Claims in Class 5 shall receive; (i) their Pro Rata distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4 and United States Trustee Fees, if any), and (ii) their pro rata distribution of the net proceeds of any recovery in Baroda II after deduction for the appropriate legal fees, costs and disbursements.
Class 6 Not Applicable	Allowed Interests	**Impaired.** On the Effective Date, each Interest Holder shall retain its respective Allowed Interest in the Debtor in return for the New Capital Contribution.

* * *

Appendix

EVENTS LEADING TO CHAPTER 11

In 1987, Bank of Baroda,[4] commenced a campaign-that effectively drove the Debtor out of business and ultimately resulted in a judgment being awarded to the Debtor in the approximate amount of $2.5 million. As detailed below, the actions taken by Bank of Baroda, and the litigation commenced in response thereto, have spun off in their wake additional claims and litigation involving a variety of parties which have continued for nearly ten years. A brief summary of some of the more important claims, parties and litigation is set forth below.

Bank of Baroda I.[5] The Debtor was formerly engaged in the business of importing ladies' sportswear from the Far East and selling those goods in the United States. The business involved placing orders for garments with foreign suppliers and promptly arranging for the issuance of letters of credit in their favor. The letter of credit guaranteed the foreign supplier that it would be paid when the garments

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4. Bank of Baroda is a foreign bank organized and existing under the laws of India and owned by the Government of India, with its principal place of business in Mumbai, formerly known as Bombay, India. Bank of Baroda is authorized to do business in the State of New York and maintains a branch office at One Park Avenue, New York, New York.

5. The following discussion of the Debtor's relationship with Bank of Baroda, which relationship led to the demise of the Debtor's business and the award of $2.6 million in the Debtor's favor, is based upon, and closely follows, the opinion of the United States Court of Appears for the Second Circuit, issued February 3, 1995, and reported as *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490 (2d Cir. 1995).

were shipped. In those foreign countries where the Debtor's suppliers were located, letters of credit were needed by manufacturers to ensure compliance with quota restrictions on exports. Normally, suppliers will not ship — and sometimes will not even begin to manufacture — garments until they receive a letter of credit. Because the garment industry is, by its very nature, seasonal, delay is very detrimental in selling a line of clothes. Due to this time factor, a delay in the issuance of a letter of credit inevitably results in a slowdown of production or a holding up of the shipment of merchandise, causing a concomitant loss of business.

Contrary to industry practice, the Debtor's suppliers often began production of garments relying on their good relationships with the Debtor and the Debtor's assurance that letters of credit would be speedily forthcoming. Swift delivery was a critical element in the Debtor's . . .

* * *

As a result of the foregoing events, the Debtor ceased operations in November 1987.

In October 1987, the Debtor commenced a civil action against Bank of Baroda and Chokshi in the United States District Court for the Southern District of New York (the "Baroda Action"). Among other things, the Debtor's complaint alleged that Bank of Baroda had breached its covenant of good faith and fair dealing implied in the revolving credit agreement; and that Bank of Baroda and Chokshi committed a prima facie tort. Bank of Baroda counterclaimed for approximately $1.7 million under its line of credit loan.

Appendix

A four day trial was scheduled to commence before District Judge Duffy on September 30, 1991. However, in late September 1991, Judge Duffy notified the Debtor and Bank of Baroda that he could not proceed as scheduled and the trial was adjourned indefinitely. The parties then consented to trial before United States Magistrate Judge Leonard A. Bernikow and a twenty-three day jury trial was held before Judge Bernikow in July and August 1992.

On August 21, 1992, the jury found that Bank of Baroda's actions were not taken in good faith but grew out of Mehta's refusal to invest in the computer business for Anil Chokshi and thus violated the covenant of good faith and fair dealing implied in the loan documents. The jury also found that Bank of Baroda and Chokshi acted with malice to injure the Debtor and that such action constituted a prima facie tort. The jury found that the Debtor had been damaged in the amount of $3 million on its contract claim, but that the Debtor had failed to mitigate $1 million of this amount. Additionally, the jury awarded the Debtor $1.25 million on its prima facie tort claim. Prior to being discharged, the jury was polled and stated it was their intention that the cumulative award to the Debtor be $3.25 million. On Bank of Baroda's counterclaim for the $1.7 million due under the line of credit, the jury concluded that Bank of Baroda had wrongfully interfered and prevented the Debtor from repaying the loan and thereby denied Bank of Baroda any recovery.

Judge Bernikow entered judgment on August 24, 1992. On September 1, 1992, Bank of Baroda filed a motion pursuant to Rule 50 of the Federal Rules of Civil Procedure seeking judgment notwithstanding the verdict or, alter-

natively, for a new trial contending that all the jury verdicts should be overturned as a matter of law.

In ruling on Bank of Baroda's motion, Judge Bernikow found that although the Debtor had proven the loss of value of its business as a going concern, it had failed to produce proof of its variable expenses and fixed costs. Thus, he concluded the Debtor had failed to prove lost profits, requiring a judgment dismissing the jury's contract damages award. He also vacated the prima facie tort award on the grounds that it was duplicative of the contract damages award. Finally, he upheld the jury's verdict on Bank of Baroda's counterclaim, observing that the Bank of Baroda's bad faith actions wrongfully prevented the Debtor from repaying the note. Accordingly, on or about December 17, 1993, Judge Bernikow dismissed all claims and counterclaims.

* * *

The Interpleader Action. On or about June 14, 1996, Bank of Baroda commenced a civil interpleader action in the United States District Court for the Southern District of New York, by filing an *Interpleader Complaint* alleging that it was required to pay the sum of $2,566,557.35 to the Debtor pursuant to the final judgment issued in the Baroda Action, and that various parties have made, or were reasonably expected to make claims against all or a portion of the proceeds of the judgment. *Bank of Baroda, Plaintiff, -against- Indu Craft, Inc., Eaton & Van Winkle, Bank of India, Hershman & Leicher, P.C., Internal Revenue Service, Department of the Treasury, New York State Department of Taxation and Finance, New York City Department* of *Finance, "John Doe and Jane Doe A through Z," said names being*

fictitious and unknown to Plaintiff, the persons or parties intended to be those individuals or entities who may claim an interest in the property interpleaded herein, Defendants, Case No. 96 C.V., 4420 (S.D.N.Y.) (the "Interpleader Action"). In connection therewith, on or about June 17, 1996, Bank of Baroda deposited $2,576,891.82 (representing the judgment rendered in the Baroda Action, together with interest thereon) into an interest bearing account maintained by the Clerk of the District Court (the "Interpleader Proceeds").

In the Interpleader Action, Bank of Baroda alleged that without a determination of the Court it was unable to pay the proceeds of the judgment without danger of exposing itself to multiple liability to those parties that had made, or could make, claims against such funds. Accordingly, Bank of Baroda, asserting itself to be a disinterested stakeholder, asked the Court to enter judgment determining the rights and priorities of the various claimants to the judgment proceeds and discharging Bank of Baroda from its liabilities with respect thereto. Bank of Baroda named as defendants in the Interpleader Action, (i) EVW, Bank of India, (ii) Hershman & Leicher, a law firm holding an alleged claim for attorneys' fees in the sum of $24,373, (iii) the IRS, holding . . .

* * *

Decision to Commence this Case

The proximate cause of the decision to seek chapter 11 relief was the Debtor's inability to consummate a settlement with the IRS. As indicated above, The Debtor believes that its 1985 tax obligation should have been abated by carrying back the 1986 and 1987 losses against the 1985 taxable gain

pursuant to section 6511 of the Internal Revenue Code. Accordingly, the Debtor believes that the maximum amount due to the IRS will not exceed $75,000.00. While the Debtor and the IRS have attempted to negotiate a resolution of this issue, the IRS insisted that the Debtor must first pay the approximate $1,100,000 claim and then apply for a refund. The Debtor believed that this process could take as much as two years, whereas it believed that in the course of a case under chapter 11, the amount of the IRS claim can be determined and the abatement amounts offset without the need to undergo a lengthy refund procedure. Accordingly, the Debtor believes that it can generate a greater and more immediate recovery for all of its creditors within the structured environment of chapter 11.

Additionally, Tze Wung has committed to contributing up to $200,000 to fund post-Effective Date Claims of the Debtor, including but not limited to Baroda II, the recoveries of which will fund the payment to holders of claims in Class 5. Tze Wung is only willing to make this contribution in the context of a confirmed chapter 11 plan of reorganization that puts to rest the Debtor's many difficulties of the last ten years. These sums would be available to the Debtor to prosecute its claims against Bank of Baroda in Baroda II.

Accordingly, to protect the interests of all of its Creditors and Interest Holders, the Debtor filed its voluntary petition commencing this case under chapter 11 of the Bankruptcy Code on the Petition Date.

* * *

Appendix

Treatment of Claims and Interests Classified Under the Plan

Articles 4 and 5 of the Plan provide for the treatment of impaired and unimpaired Claims and Interests classified in Article 3 of the Plan as follows:

Class I - EVW Secured Claim. In full satisfaction of the EVW Secured Claim against the Debtor, if any, EVW shall receive the treatment accorded to it under the Stipulation and Consent Order Resolving Claims of Eaton & VanWinkle and Providing Relief from the Automatic Stay, a copy of which is annexed to the Plan as Exhibit "A" and the terms of which are incorporated by reference therein.

Class 2 - IRS Interest Claim. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, in full satisfaction of the IRS Interest Claim against the Debtor, if any, upon resolution of the Adversary Proceeding, the IRS shall receive payment in cash, in the amount of one hundred percent (100%) of its Allowed Claim.

Class 3 - Unsecured Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of Administrative Claims, Priority Claims, and Trustee Fees, if any, each holder of an Unsecured Claim shall be paid, in cash, in full on the Effective Date.

Class 4 - Tze Wung Secured Claim. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, on the Effective Date, as soon as practicable follow-

ing the resolution and payment to holders of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Class 2 and 3, and Trustee Fees; the holder of an Allowed Claim in Class 4 shall receive its Pro Rata Distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2 and 3) and Trustee Fees.

Class 5 - Subordinated Claims. Subject to the provisions of Article 8 of the Plan with respect to Disputed Claims, as soon as practicable following the resolution and payment of holders of Allowed Administrative Claims, holders of Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4, and United States Trustee Fees; holders of Allowed Claims in Class 5 shall receive; (i) their Pro Rata distribution of all available Distributable Cash (after taking into account payments made on account of Allowed Administrative Claims, Allowed Priority Tax Claims, holders of Allowed Claims in Classes 2, 3 and 4 and United States Trustee Fees, if any), and (ii) their pro rata distribution of the net proceeds of any recovery in Baroda II after deduction for the appropriate legal fees, costs, and disbursements.

* * *

RISK FACTORS

Although the Debtor believes that it will be able to meet all of the obligations that it is undertaking pursuant to the Plan there can be no assurance that future events will not cause the Debtor to default on one or more of its obligations

under the Plan. The following factors (and other risks considered elsewhere in this Disclosure Statement) should be considered by each Creditor, Interest Holder and their respective advisers.

There can be no assurance that the tax claims of the IRS and the City and the State of New York can be resolved and reduced to the amounts that the Debtor believes is appropriate as set forth above. There can be no assurance that the Debtor will recommence the litigation in Baroda II, or that such litigation, if commenced would be resolved in the Debtor's favor.

Further, there can be no assurance that the Debtor's business, which will be recommenced following the Debtor's receipt of the New Capital Contribution, will be successful.

* * *

Feasibility. For the Plan to be confirmed, it must be demonstrated that consummation of the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Debtor. For purposes of determining whether the Plan meets this requirement, the Debtor has analyzed its ability to meet its obligations under the Plan. Inasmuch as the Plan provides for the distribution to holders of Allowed Administrative Claims, Allowed Priority and Priority Tax Claims and holders of Allowed Claims in Class 3 from the Interpleader Proceeds, the Debtor believes that it will be able to make all payments required to be made pursuant to the Plan.

* * *

Appendix

EFFECT OF CONFIRMATION

On the Effective Date, the Debtor will be discharged from all Claims and Interests which existed prior to confirmation of the Plan, except for payments and distributions provided for in the Plan or in the order of the Bankruptcy Court confirming the Plan. The Debtor's discharge will be fully effective against all Creditors and Interest holders, regardless of whether they have voted to accept or reject the Plan and regardless of whether the Plan is confirmed by consent or by resort to the provisions of section 1129(b) of the Bankruptcy Code.

Discharge of Debtor

On the Effective Date the Debtor will be discharged pursuant to section 1141 of the Bankruptcy Code from all Claims against and Interests in the Debtor that arose prior to the Effective Date and from any liability of a kind specified in sections 502(g), 502(h) or 502(i) of the Bankruptcy Code whether (i) a Proof of Claim or Proof of Interest has been filed or deemed to have been filed with respect to such Claim or Interest, (ii) such Claim or Interest is allowed or disallowed, or (iii) the holder of such Claim or Interest has accepted the Plan. All Persons will be precluded and enjoined from asserting against the Debtor and its successors, assets or properties, or against any property that is distributed, or is to be distributed under the Plan, any other or further Claim or Interest based upon any acts or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date. The entry of the Confirmation Order shall forever stay, restrain and permanently enjoin (i) the

commencement or continuation of any action, the employment of process, or any act to collect, enforce, attach, recover or offset from the Debtor, or from property of the Debtor, (ii) the creation, perfection or enforcement of any lien or encumbrance against any property of the Debtor or any property distributed under the Plan, or (iii) any Claim or Interest discharged under the Confirmation Order, the Plan or pursuant to section 1141(d)(1) of the Bankruptcy Code, except as otherwise provided in the Plan, or in the Confirmation Order, or with respect to the Debtor's obligations under the Plan or Confirmation Order.

Releases

Section 1125(e) of the Bankruptcy Code, commonly referred to as the "safe harbor," protects persons acting in good faith, from civil claims arising in connection with solicitations of acceptances of plans of reorganization or participating in the offer, issuance, sale or purchase of a security under the Plan. Pursuant to section 1125(e), as set forth in Article 9 of the Plan, neither the Debtor, nor its respective officers, directors, general partner, managing agent or employees (acting in such capacity) nor any professional person employed by any of them, shall have or incur any liability to any entity for any action taken or omitted to be taken in connection with or related to the formulation, preparation, dissemination, Confirmation or consummation of the Plan, the Disclosure Statement or any contract, instrument, release or other agreement or document created or entered into, or any other action taken or omitted to be taken in connection with the Case or the Plan. From and after the Effective Date, a copy of the Confirmation Order and the

Plan shall constitute and may be submitted as a complete defense to any claim or liability released pursuant to this Article 9 of the Plan.

Further, upon the Effective Date, in consideration of the Cash and other property to be distributed to or on behalf of the holders of Claims under the Plan, the Plan shall be deemed to resolve all disputes and constitute a settlement and release, between and among the Debtor, its partners, officers, directors, agents, representatives and employees and shall constitute a release of the Released Entities, effective as of the Effective Date, by the Debtor, on its own behalf and on behalf of all Interest Holders and Creditors, and by each Creditor and Interest Holder from any claim or liability, whether legal, equitable, contractual, secured, unsecured, liquidated, unliquidated, disputed, undisputed, matured, unmatured, fixed or contingent, known or unknown, that the Debtor, its Creditors or Interest Holders ever had, now have or hereafter may have (including, without limitation, any claims the Debtor may assert on its own behalf or on behalf of Creditors or Interest Holders pursuant to sections 510 and 542 through 553 of the Bankruptcy Code, any claims Creditors or Interest Holders may have asserted derivatively on behalf of the Debtor absent bankruptcy, any claims based on the conduct of the Debtor's business affairs prior or subsequent to the commencement of the Case or any claims based on the negotiation, submission and confirmation of the Plan).

* * *

Appendix

CONCLUSION

The Debtor believes the Plan is in the best interests of all Creditors and Interest Holders and strongly encourages all holders of Claims against and Interests in the Debtor to vote to accept the Plan and to evidence such acceptance by promptly returning their Ballots to ensure that they will be received not later than 5:00 p.m., Eastern Standard Time, on _____, 1998.

Dated: New York, New York
November 9, 1998

INDU CRAFT, INC.

By: s/ Hemant Mehta
Hemant Mehta, its President

ROBINSON BROG LEINWAND GREENE
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By: s/ A. Mitchell Greene
A. Mitchell Greene (AMG-5900)

EXCERPTS FROM TRANSCRIPT OF HEARING HELD ON OCTOBER 5, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

89 Civ. 5996 JSM

BANK OF INDIA,

Plaintiff,

v.

TRENDI SPORTSWEAR, INC., et al.,

Defendants.

October 5, 1990
3:00 p.m.

Before:

HON. JOHN S. MARTIN
District Judge

* * *

THE COURT: Don't we really have a manufactured claim here? My right pocket is suing my left pocket, right?

MR. CHASE: It's true that the companies are related. And it may also be true that it might have been possible to assert these claims previously.

We cant speak to that because as it happens we were not counsel for Indu Craft at the time that any possible action could have been taken.

THE COURT: I think it is something I can take into consideration in exercising my discretion as to whether or not to stay this action.

* * * *

TRANSCRIPT OF BANKRUPTCY COURT HEARING HELD ON DECEMBER 22, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No.
9744958

In the Matter

of

INDU CRAFT, INC.,

Debtor.

December 22, 1998

Motion for fourth Order extending Debtor's exclusive right to file a plan and solicit acceptances.

BEFORE:

HON. JEFFRY H. GALLET,
Bankruptcy Judge

PROCEEDINGS

MR. SHAFFERMAN: Good morning, Your Honor, I'm here on a motion on the fourth extension of the Debtor's exclusive period.

We've been striving to confirm a plan. A Disclosure Statement has been approved, as I had stated in a previous

hearing. We've got — we thought we had an agreement with the Internal Revenue Service or the U.S. Attorney's Office as to their treatment, but it had to go through another branch of the government. I learned about a week or ten days ago, it still had left not left the U.S. Attorney's office, so we're going to be modifying the plan, and we filed this motion prior to my learning that information.

We're seeking a short extension —

THE COURT: Why do you need an extension? Is it that somebody is pounding on your door to file a plan?

MR. SHAFFERMAN: No, Your Honor, that's not the case, but I've learned in this case and others that anything is possible —

THE COURT: That's the reason that I'm going to deny the motion. This Debtor has had lots of chance to do it. If somebody rushes up with a plan, I'm going to let them do that.

It's unlikely in this case, but I don't think that this case, at this point, meets any of the reasons Congress contemplated for extending it.

In fact, I didn't think it did last time, but I extended it anyway.

You can only carry me beyond Congress for so many extensions denied.

MR. SHAFFERMAN: Thank you, would Your Honor want me to submit an Order?

THE COURT: Please.

MR. SHAFFERMAN: Thank you.

THE COURT: This case, by the way, has reached the end of its rope. It is very shortly going to be confirmed on the plan you have or it's going to be converted.

There are lots of things on this plan that are beginning to make me very, very nervous, the way the claims are, the insider problems. This may be a case that would well be served by either a Chapter 11 or Chapter 7 Trustee.

If it goes through or not, I think the moment may come to have someone else take a look at this arrangement as it unravels before my eyes.

MR. SHAFFERMAN: Well, Your Honor —

THE COURT: I'm not doing anything today, I'm just warning you for the next time.

MR. SHAFFERMAN: As of now I believe — I'm hopeful that but for IRS and one other creditor, we're there.

THE COURT: There are some potential loose ends in this plan, and they are loose ends that are causing you some concern.

MR. SHAFFERMAN: Thank you.

JOINT STATEMENT OF FACTS CONCERNING THE CLAIMS OF TRENDI SPORTS-WEAR, INC. AND INDU CRAFT, INC. DATED JUNE 10, 1999

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

CHAPTER 11

CASE NO. 97 B 44958 (JHG).

In re:

Indu Craft, Inc.

Debtor

Joint Statement of Facts Concerning The Claims of Trendi Sportswear, Inc. and Indu Craft, Inc. (Claim #8)

1. Indu Craft, Inc. ("Indu Craft") agreed to deliver ladies' ready-made garments ("Garments") worth $7,217,115.50 between June and September of 1987 to Trendi Sportswear, Inc. ("Trendi").

2. Due to Bank of Baroda's wrongful denial of credit to Indu Craft, Indu Craft (a) sued Bank of Baroda on October 15, 1987, but (b) substantially failed to deliver the Garments to Trendi as promised.

3. If Indu Craft had delivered the Garments as promised, Trendi would have sold those Garments for $10,035,816.16.

4. Trendi lost gross profits in the amount of $2,818,640.66 due to Indu Craft's failure to deliver the Garments.

5. Trendi attempted to mitigate its damages caused by Indu Craft's failure to deliver the Garments.

6. For mitigating its damages, Trendi purchased Garments worth $2,597,553.77, from overseas manufacturers.

7. Indu-Craft's failure to deliver as promised caused a significant delay in Trendi delivering the Garments to its customers, since Trendi had to arrange for financing, processing, and delivery of the Garments from overseas manufacturers itself.

8. Due to the delay occasioned by Indu Craft's failure to deliver the Garments as promised ("Delay"), Trendi's deliveries to its customers were in turn delayed.

9. Due to the Delay, Trendi was unable to sell the Garments at the price it could have otherwise charged to its customers.

10. Due to Trendi's delay in delivery, caused by Indu Craft's Delay, Trendi could not get reorders from its customers.

11. Due to the Delay, several of Trendi's customers canceled their orders.

12. As a result of such cancellations, Trendi had to sell significant quantities of Garments at reduced prices to new buyers.

Appendix

13. Due to the Delay, Trendi also had to give significant discounts and rebates to those of its customers who did not cancel their orders.

14. Due to the Delay, Trendi was unable to sell significant quantities of those Garments quickly.

15. Due to the Delay, Trendi was not able to sell about two thirds of the Garments by October 15, 1987.

16. If Indu Craft had delivered the Garments as promised, Trendi could and would have sold the Garments by October 1987.

17. As a result, Trendi had to store significant quantities of those Garments in warehouses and sell them at distress prices as late as 1988 and 1989.

18. Trendi sold these Garments for the sum of $2,365,583.82.

19. As a result, Trendi lost $231,968.95 in attempting to mitigate its damages.

20. Trendi's gross losses due to Indu Craft's failure to deliver the Garments according to contract were $3,050,609.61 (=$2,818,640.66 + $231,968.95).

21. If Indu Craft would have performed as contracted, Trendi's additional variable expenses attributable to Trendi's performance (including, for example, shipping, processing, and other overheads) would have been $273,581.66.

Appendix

22. Trendi's net losses, i.e., gross profits less variable costs, attributable to Indu Craft's failure to deliver the Garments as promised amounted to $2,777,027.95 (= $3,050,609.61 - $273,581.66) as of December 31, 1987.

23. With simple interest, Trendi's damages (net losses) amount to $5,169,437.53 as of July 28, 1997, the date Indu Craft, Inc. filed the underlying petition for bankruptcy with this Court.

24. Due to Indu Craft's failure to deliver the Garments as promised, Trendi was unable to fulfill its financial obligations to BOI.

25. As a result, BOI sued Trendi, and entered judgment against Trendi for $2,244,895.19 in the United States District Court for Southern District of New York on April 22, 1991 ("Judgment").

26. Together with interest, Trendi's liability under this judgment is now estimated at $4,293,990.64, with interest at 9% p.a. from October 26, 1998.

27. Moreover, BOI debited Trendi's account for $397,055.00 towards the purchase price of Garments ordered by Trendi from abroad.

28. However, BOI did not permit Trendi to take delivery of the said Garments worth $397,055.00 due to Trendi's default caused by Indu Craft.

29. As a result, Trendi was unable to receive delivery of Garments worth $397,055.00 which it had ordered and become liable for.

30. With interest from the date of entry of Judgment, this claim amounts to $621,073.43, as of July 28, 1997.

31. Indu Craft's breach of the contract led to Trendi losing creditworthiness, tremendous goodwill, and customer confidence, so much so that Trendi's business was destroyed.

32. Trendi's damages attributable to the destruction of its business are $8,225,000 as of December 31, 1987.

33. With interest, these damages of Trendi amount to $15,310,837.51 as of July 28, 1997.

Dated this 10th day of June, 1999.

Robinson Brog Leinwand Greene Genovese & Gluck P.C.

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DECISION AND ORDER RESOLVING CLAIMS OBJECTION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 12, 1999

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No.: 97-B-44958 (JHG)

In re:

INDU CRAFT, INC.,

Debtor.

DECISION AND ORDER RESOLVING CLAIMS OBJECTION

JEFFRY H. GALLET
UNITED STATES BANKRUPTCY JUDGE

BACKGROUND

On July 25, 1997 Indu Craft, Inc., the debtor and debtor in possession (the "Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code. On September 8, 1997, Trendi Sportswear, Inc. ("Trendi") filed a Proof of Claim in this Court asserting an unsecured claim, in an unknown amount (hereinafter the "Claim". By notice of motion dated July 30, 1998 the Debtor objected to certain claims including Trendi's Claim based on the fact

that it was filed in an undetermined amount. Trendi thereafter submitted numerous documents, along with a Memorandum of Law and Affidavit of Ronald Quintero and Jagdish Patel, in support of Trendi's Claim. A Joint Statement of Facts ("JSOF") along with separate legal briefs of Trendi and Indu Craft were filed with the Clerk's office on June 10, 1999. Response papers were filed by Trendi only. The papers reflect Indu Craft's liability to Trendi. Thus, the only issue before me is the amount of Trendi's claim.

DISCUSSION

Trendi claims that it is entitled to $21,101,348.47, which represents a business venture gone bad. Indu Craft claims the amount of damages should be $20,480,275.04. There is a $621,073.43 difference. This amount reflects mitigation damages plus interest up to the date of filing the petition. In the JSOF the parties stipulated to the fact that Trendi suffered mitigation damages and to the amount of these damages. Indu Craft however, failed to include this figure in their calculation of damages, and furthermore offers no arguments as to why Trendi should not receive this $621,073.43. Based upon this stipulation I find that Trendi's claim should be $21,101,348.47.

It is unclear from Trendi's papers whether it is seeking post petition interest on its claim. It is a fundamental principle of bankruptcy law, however, that unsecured creditors are not entitled to post petition interest. *See Kitrosser v. CIT Group/ Factoring, Inc.*, 177 B.R. 458, 467 (Bankr. S.D.N.Y. 1995); *In re Pine Lake Village Apartment Co.*, 19 B.R. 819, 826 (Bankr. S.D.N.Y. 1982).

CONCLUSION

Trendi's claim in this proceeding shall be fixed at $21,101,348.47 and shall not accrue interest, post petition.

So Ordered.

Dated: New York, New York
July 12, 1999

s/ Jeffry H. Gallet
Jeffry H. Gallet
United States Bankr. Judge

FINAL DECREE OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 17, 2000

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Confirmed Chapter 11

Case No.: 97-B-44958(JHG)

In Re:

INDU CRAFT, INC.,

Debtor.

FINAL DECREE

Upon the application of the **Indu Craft, Inc.,** the above-captioned debtor (the "Debtor"), dated May 15, 2000 (the "Application"), by its attorneys, **Robinson Brog Leinwand Greene Genovese & Gluck P.C.,** for an Order granting a Final Decree in this case; and it having been represented and it appearing that the estate of the Debtor has been fully administered and the initial distributions required pursuant to the Debtor's confirmed plan of reorganization, (the "Plan") have been made to all Creditors at their last known addresses; and it also appearing that notice of the submission of the Application and service of a copy thereof was duly and timely made upon the Office of the United States Trustee, and that no objection was made to granting the relief requested therein, and sufficient cause appearing to me therefor, it is

ORDERED, that, as provided for in the Plan, the Debtor is discharged and released from any and all claims of creditors; and it is further

ORDERED, that, in accordance with the Plan, the holders of claims against the Debtor are enjoined and restrained from instituting or continuing any action to collect such debts; and it is further

ORDERED, that the above-captioned Chapter 11 Case be, and it hereby is, closed.

DATED: New York, New York
May 17, 2000

s/ Jeffry H. Gallet
Honorable Jeffry H. Gallet
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
NOV 18 2003
OFFICE OF THE CLERK

(3)

No. 03-535

IN THE

Supreme Court of the United States

INDU CRAFT, INC.,

Petitioner,

v.

BANK OF BARODA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Statement Pursuant To Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
I. Baroda's Assertion Of Indu Craft's Discharge Of Trendi's Claim As A Bar To Its Derivative Liability Is Prohibited By Section 524(e)	1
A. Baroda May Not Assert Indu Craft's Discharge As A Defense To Its Derivative Liability	1
B. Compelling Reasons Exist For Granting The Petition	6
II. Section 524(e) Abrogates The Payment Rule Of State Indemnity Law	7
III. Since The District Court Held That The Act Of Confirmation Prevented Payment Of The Plan's Allowed Claims, Its Holding Necessarily Undermined The Feasibility Finding Of The Bankruptcy Court	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

In re Acequia, Inc., 34 F.3d 800 (9th Cir. 1994) 5

Bell v. Eastman Kodak Co., 214 F.3d 798 (7th Cir. 2000) 10

Bowers v. American Surety Co., 30 F.2d 244 (2d Cir.), *cert. denied*, 279 U.S. 865, 49 S. Ct. 480, 73 L. Ed. 1003 (1929) 4

Bursch v. Beardsley & Piper, Division of Pettibone Corp., 971 F.2d 108 (8th Cir. 1992) 3

Butner v. United States, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979) 8

Campbell v. General Financing Corp. of Virginia, 523 F. Supp. 989 (W.D. Va. 1981) 4

Celotex Corporation v. Edwards, 514 U.S. 300 (1995) 10

City of Redmond v. Robinson, 517 U.S. 1201, 116 S. Ct. 1702, 134 L. Ed. 2d 801 (1996) 2

In re Glen-Bern Industries, Inc., 1 Bankr. Ct. Dec. (CRR) 1356, 6 Collier Bankr. Cas. (MB) 100 (Bankr. D. Mass. 1975) 2

Green v. Welsh, 956 F.2d 30 (2d Cir. 1992) 4

Healey v. Scovone, No. 98-2285, 1999 U.S. App. LEXIS 17385 (10th Cir. 1999) 5

Cited Authorities

	Page
In re Jet Florida Systems, Inc., 883 F.2d 970 (11th Cir. 1989)	2
Kaiser Aerospace & Electric Corp. v. Teledyne Industrial (In re Piper A.), 244 F.3d 1289 (11th Cir. 2001), *cert. denied*, 534 U.S. 827 (2001)	9
In re Lembke, 93 B.R. 701 (Bankr. D.N.D. 1988)	3, 4
Lewis v. Manufacturers National Bank, 364 U.S. 603, 5 L. Ed. 2d 323, 81 S. Ct. 347 (1961)	5
In re Mann, 58 B.R. 953 (Bankr. W.D. Va. 1986)	4
Maryland v. Louisiana, 451 U.S. 725, 68 L. Ed. 2d 576, 101 S. Ct. 2114 [56] (1981)	8
Moyer v. Dewey, 103 U.S. 301, 26 L. Ed. 394 (1880)	2
In re Nation, 236 B.R. 150 (Bankr. S.D.N.Y. 1999)	8
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)	8
Pepper v. Litton, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939)	3
Precision Industrial v. Qualitech Steel SBQ, LLC, 327 F.3d 537 (2003)	9

Cited Authorities

Page

Stellwagen v. Clum, 245 U.S. 605, 62 L. Ed. 507, 38 S. Ct. 215 (1918) 8

Underhill v. Royal, 769 F.2d 1426 (9th Cir. 1985) 4

FEDERAL STATUTES

11 U.S.C. § 524 5

11 U.S.C. § 524(a) 1, 2, 3

11 U.S.C. § 524(e) ..... *passim*

11 U.S.C. § 1126(f) 10

MISCELLANEOUS

Bankruptcy Code § 1123(b) 5

4 William M. Collier *et al.*, *Collier on Bankruptcy* ¶ 524.05 (2002 ed.) 4

Petitioner Indu Craft, Inc. respectfully submits this reply memorandum in further support of its petition for a writ of certiorari to review the mandate of the United States Court of Appeals for the Second Circuit.

Respondent Baroda urges this Court not to grant the certiorari because it maintains there is no compelling public reason for the Court to do so and that the Court cannot cure a wrong done to one private litigant and the integrity of certiorari process will be jeopardized. To the contrary, (1) there is a major conflict among circuits with respect to the application of the provisions of the Bankruptcy Code involved in our case – Section 524(e) – with respect to whether this section applies to non-debtors and tortfeasors and (2) Second Circuit allowed a third party to use debtor's discharge as a defense against debtor's claim in violation of the Bankruptcy Code and this Court's rulings, which hold that discharge is a debtor's personal defense.

I. Baroda's Assertion Of Indu Craft's Discharge Of Trendi's Claim As A Bar To Its Derivative Liability Is Prohibited By Section 524(e)

A. Baroda May Not Assert Indu Craft's Discharge As A Defense To Its Derivative Liability

Baroda argues that it has not relied upon nor asserted the benefit of section 524(e). *See* Bank of Baroda Brief in Opposition at 12. This argument, however, seeks to obscure the fact that the basis of Baroda's motion to dismiss was predicated on its contention that bankruptcy judgment was void under section 524(a) of Bankruptcy Code because it had been discharged by Indu Craft's Plan. Baroda argued that by virtue of "the effect of such discharge under Bankruptcy Code" a derivative claim could not be asserted against it because "Indu Craft has not suffered, and cannot suffer, any loss or damage resulting from the Trendi Judgment, [1] which is void." *See* Bank of Baroda's Memorandum of Law in Support of Motion to Dismiss First

1. In its opposition papers, Baroda mischaracterizes Trendi as Indu Craft's "affiliate." Trendi has never had any interest in Indu Craft, whose sole shareholder is Tze Wung Consultant, Ltd. *See* Brief in Opposition, App. 2a. Moreover, Indu Craft has never had any financial interest in Trendi. During the 1980's, the companies had a common principal stockholder.

Amended Fourth-Party Complaint at 13-14.[2] There can be no question that in obtaining dismissal of Indu Craft's amended fourth-party complaint, Baroda was seeking and, in fact, obtained the benefit of Indu Craft's discharge under Bankruptcy Code. Section 524(e) was written precisely to combat this argument by a derivatively liable non-debtor and to prevent the result reached by the courts below.

Section 524(a) of Bankruptcy Code codifies what has long been settled that a discharge is personal to the debtor and cannot be used to benefit third parties. 11 U.S.C. § 524(a). Accordingly, the statutory language, on its face, does not preclude the determination of the debtor's liability upon which the damages would be owed by another party. *Moyer v. Dewey*, 103 U.S. 301, 302-03 26 L. Ed. 394 (1880) ("Under these circumstances, we concur with the opinion of the Court of Appeals, that so far as the discharge itself is concerned, its only effect is personal to him, and does not avail to release the defendants in this suit from liability for the fraud committed by them"); *In re Jet Florida Systems, Inc.*, 883 F.2d 970, 973 (11th Cir. 1989) (same); *In re Glen-Bern Industries, Inc.*, 1 Bankr. Ct. Dec. (CRR) 1356, 6 Collier Bankr. Cas. (MB) 100, 102 (Bankr. D. Mass. 1975) (although decided under § 16 of the Bankruptcy Act of 1898, the court reasoned that a discharge is personal to the debtor and does not accrue to the benefit of third parties who may have liability based on the bankrupt's liability). Because discharge of the Trendi debt was the personal liability of Indu Craft, Baroda lacked judicial standing to plead Indu Craft's discharge as a defense in the District Court action or move against the amended fourth-party complaint on that basis.[3]

2. Indu Craft did in fact suffer a loss by assigning its right to the proceeds of its derivative claim against Baroda to its creditors in exchange for their votes in favor of confirmation of its Plan and subsequent discharge.

3. Baroda argues that Indu Craft did not raise in the courts below its argument that Baroda lacked legal standing to assert Indu Craft's discharge as a defense in the District Court. An issue with respect to a party's standing is not subject to waiver and this Court can consider the issue even if not addressed by the courts below. *City of Redmond v. Robinson*, 517 U.S. 1201, 1201, 116 S. Ct. 1702, 134 L. Ed. 2d 801 (1996) (Rehnquist, J., Scalia, J. and Thomas, J., dissenting). Moreover, Indu Craft's standing argument is predicated on Baroda's collateral attack on the Plan in the District Court which was considered by the courts below.

What the courts below failed to recognize is that a discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability which, by virtue of section of 524(a)(2), bars its enforcement against him. The debt still exists, however, and can be collected from any other entity that might be liable. *In re Lembke*, 93 B.R. 701, 702 (Bankr. D.N.D. 1988). In other words, "[w]here a claim is discharged, the debt is recognized in bankruptcy – that is, allowed – but the debtor is relieved of responsibility for it. Because this relief is limited to the debtor, a party derivatively liable for the debt, such as an insurer, remains responsible." *Bursch v. Beardsley & Piper, Div. of Pettibone Corp.*, 971 F.2d 108, 114 (8th Cir. 1992). Congress promulgated 524(e) to insure that a derivatively liable defendant cannot assert as a defense to its own liability for the debt, the debtor's discharge of it legal obligation to pay the debt.

The critical fact relied upon by the courts below in dismissing the amended fourth party complaint – that Indu Craft did not have to pay the bankruptcy judgment[4] – does not give rise to a defense to the assertion of an indemnification claim by the debtor against its indemnitor.[5]

4. Baroda attempts to argue that the bankruptcy judgment is collusive. A large part of the bankruptcy judgment is interest from 1987, when actions were taken by Baroda which caused the destruction of Indu Craft's business. Trendi submitted twelve volumes of purchase orders and actual sales documents in the proceeding before the Bankruptcy Court fixing its claim against Indu Craft as well as proof of the value of its business through expert affidavits. Trendi was initially attempting to prove a claim in the amount of $29,490,290 or, alternatively $25,201,120. Indu Craft objected to Trendi's claim and argued that the Trendi's claim should be allowed in the amount of $20,480,275.04. Trendi ultimately agreed to a reduction in its provable damages in supplemental submissions to the Bankruptcy Court. A bankruptcy court has the power and obligation to inquire into the validity of any claim and disallow if determined to be improper in any way. *Pepper v. Litton*, 308 U.S. 295, 305-306, 60 S. Ct. 238, 84 L. Ed. 281 (1939). It is thus patently improper to argue in its opposition brief that the bankruptcy judgment is collusive. The courts below have made no such finding and Baroda did not predicate its motion to dismiss on this basis. Moreover, Indu Craft was entitled to have all inferences drawn in its favor on Baroda's pre-answer motion to dismiss.

5. Indu Craft argued in the courts below that the bankruptcy judgment was excepted from discharge because its entry against the debtor was (Cont'd)

It is elementary that a discharge releases the debtor from any legal duty to repay the debt. *Campbell v. General Financing Corp. of Virginia*, 523 F. Supp. 989 (W.D. Va. 1981). Notwithstanding, section 524(e) commands that the liability of a non-debtor is not affected by the discharge of the debtor's legal obligation for the debt. The courts below clearly erred in holding that because Indu Craft "was discharged from its obligation to pay the judgment entered against it in the bankruptcy proceeding," Baroda could not be held derivatively liable for the judgment. *See* Petition, App. 25a.

Numerous cases have held that section 524(e) bars an insurer from raising the debtor's discharge and inability to pay as a defense to a claim by an injured party through the debtor under the debtor's insurance policy. *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (collecting cases); *Bowers v. American Surety Co.*, 30 F.2d 244, 245 (2d Cir.), *cert. denied*, 279 U.S. 865, 49 S. Ct. 480, 73 L. Ed. 1003 (1929); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985).[6] The reasoning of the insurance cases is that the case can proceed against the debtor for the purpose of obtaining a judgment against the debtor so long as the debtor does not have to pay the judgment for the purpose of getting the debtor's indemnitor to pay the judgment. As the *Lembke* court noted, "[i]t makes no sense legally or equitably for an insurer to escape insurance coverage for injuries caused by its insured merely by the happenstance of the insured's bankruptcy discharge. Such a result would be fundamentally wrong." 93 B.R. at 702.

(Cont'd)

authorized by the Plan and, moreover, section 9.1(c) of the Plan expressly excepted judgments of the Bankruptcy Court from discharge. But even assuming that Indu Craft was discharged from having to pay the bankruptcy judgment, as determined by the courts below, this fact does not prevent the assertion of an indemnification claim by the debtor as demonstrated herein.

6. To the extent that Baroda argues that section 524(e) is limited to guarantors and co-obligors, such an argument is plainly contrary to the statutory language and legislative history. *Green*, 956 F.2d at 33 n.1; *In re Mann*, 58 B.R. 953, 956 n.4 (Bankr. W.D. Va. 1986); *see also* 4 William M. Collier et al., *Collier on Bankruptcy* ¶524.05 (2002 ed.) ("Hence it has been repeatedly held that the discharge has no effect on a nondebtor, codebtor or guarantor of the discharged debt").

The imposition of the payment rule imposed by the courts below as a condition to the prosecution of Indu Craft's suit against Baroda as Indu Craft's indemnitor cannot be squared with this reasoning or the legislative history of section 524. If an insurer may be held derivatively liable to the debtor despite the discharge of the debtor's liability to the injured party, then there is no analytical difference why Baroda cannot be held derivatively liable to Indu Craft for the debt owed to Trendi as the result of Baroda's tortious conduct. In short, if Indu Craft is entitled to be indemnified by Baroda, then the derivative suit should have not been dismissed by the District Court and Baroda was prohibited from asserting Indu Craft's discharge and consequent release of any duty to pay the bankruptcy judgment as a defense to its derivative liability. *Healey v. Scovone*, No. 98-2285, 1999 U.S. App. LEXIS 17385 (10th Cir. 1999) (action could proceed against debtor and debtor' indemnitor if debtor is entitled to indemnification).[7]

It would be similarly fundamentally wrong to allow Baroda to ride the coattails of Indu Craft's discharge and provide it with a windfall merely as the result of the happenstance of Indu Craft's bankruptcy. *See Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609, 5 L. Ed. 2d 323, 81 S. Ct. 347 (1961). Indeed, section 1123(b) of Bankruptcy Code authorizes post-confirmation pursuit of a debtor's bankruptcy causes of action. As the court in *In re Acequia, Inc.*, 34 F.3d 800, 807-08 (9th Cir. 1994) aptly noted: "If the confirmation of a plan of reorganization . . . sufficed to eliminate [the debtor's] causes of action . . . , both section 1123(b)(3)(B) and the litigation-enabling provision of [the debtor's] plan would be pointless. . . . [a]nd . . . debtors would undoubtedly delay filing plans of reorganization until completing all potential litigation." Here, what makes the decisions of the courts below plainly wrong is that Indu Craft could have pursued its derivative claim against Baroda pre-confirmation and had it done so there would be no issue of discharge. It also nonsensical, and wrong as a matter of law, to bar Indu Craft

7. The District Court and Court of Appeals determined that Indu Craft's amended fourth party complaint set forth proper claims against Baroda for indemnification. *See* Petition, App. 24a.

from pursuing its derivative claim against Baroda post-confirmation where its Plan so provides. Section 524(e) flatly bars such a result.

B. Compelling Reasons Exist For Granting The Petition

The Court should not allow the courts' opinions in this case to stand as precedent in such an important area of bankruptcy law.[8] These decisions may be used as a basis to defeat any post-discharge claim for indemnification brought by a debtor. A determination by the Court that section 524(e) prohibits a derivatively liable party from asserting the debtor's release from its obligation to pay a judgment rendered against it as a defense to the derivative claim by the debtor will have applicability in every federal court and state court in the country in which an indemnification claim may be asserted by a debtor or by an injured party through the debtor.

Moreover, a determination by the Court that Baroda may not be advantaged by the discharge of the debtor in the context of a derivative claim fairly subsumes and, therefore, will resolve, the question under section 524(e), over which there is a substantial conflict among the circuit courts, whether, and under what circumstances, a bankruptcy court may release a non-party of claims based on the debtor's discharge. *See* Petition at 18-20.

Finally, this case should be reviewed by the Court because the courts below came to the untenable conclusion that confirmation of the Plan discharged the new payments in the form of allowed claims that the debtor promised to pay its creditors under the Plan. This holding taken to its logical conclusion would relieve debtors from their contractual obligations under confirmed plans post-confirmation at the moment of its discharge – contrary to the fundamental expectations of the debtor and its creditors in every reorganization proceeding.

---

8. According to the American Bankruptcy Institute ("ABI"), there were 1,577,651 bankruptcy cases filed in the U.S. in 2002, 72,990 of which were filed in New York, or roughly 4.6% of the total filings. American Bankruptcy Institute (http://www.abiworld. org/stats/1980annual.html). Moreover, New York is the situs of many of the largest bankruptcy filings: Worldcom, Inc. ($103,914,000,000 assets), Enron ($63,392,000,000), Global Crossing Ltd ($30,185,000,000), Adelphia Communications ($21,499,000,000).

II. Section 524(e) Abrogates The Payment Rule Of State Indemnity Law

Baroda contends that Indu Craft failed to raise the question of whether 524(e) abrogates the common law indemnification payment rule. Indu Craft raised in both the district court and the court of appeals the issue of whether under section 524(e) Indu Craft's discharge and consequent release of its obligation to pay the bankruptcy judgment is a defense to the assertion of a derivative claim against Baroda. The central holding of the District Court's decision, which was adopted by the Court of Appeals, is that Indu Craft's discharge from having to make payment of the bankruptcy judgment prevented the assertion of a derivative claim against Baroda and that section 524(e) is inapplicable in preventing the assertion of such defense. In other words, the District Court held that the payment rule of common law indemnity trumps section 524(e)'s mandate that "the discharge of the debt of the debtor does not affect the liability of any other entity . . . for such debt."

In its reply brief in the court of appeals, Indu Craft argued precisely the point that it raised in its Petition, that "[s]ection 524(e) in effect abrogates the payment rule because on its face it prevents the insolvency of the debtor from being asserted as a defense by the derivatively liable defendant." *See* Reply Brief for Third-Party Defendant-Fourth-Party-Plaintiff-Appellant Indu Craft, Inc. at 6. The Court of Appeals considered and rejected this argument in reaching its decision. *See* Petition, App. 6a ("upon review of the record and consideration of all the arguments presented by the parties, we affirm the dismissal of the amended fourth-party complaint and the second third-party complaint largely for the reasons stated in the opinions of the District Court."). The preemption point raised in the Petition is a corollary of the abrogation point and is fairly subsumed within the holdings of the courts below that the payment rule of state indemnity law prevents the assertion of a derivative claim, notwithstanding section 524(e)'s bar against the assertion of the debtor's non-payment of the debt by a non-debtor indemnitor in a derivative action.

Preemption may be implied if state and federal laws conflict or a state law thwarts the "accomplishment and

execution" of congressional intent. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722, 75 L. Ed. 2d 752 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 747, 68 L. Ed. 2d 576, 101 S. Ct. 2114 [**56] (1981) (State law is void to the extent it is in conflict with a federal statute.); *Stellwagen v. Clum*, 245 U.S. 605, 613, 62 L. Ed. 507, 38 S. Ct. 215 (1918) (The provisions of the federal bankruptcy code preempt those state laws that are in conflict with federal law); *In re Nation*, 236 B.R. 150, 154 (Bankr. S.D.N.Y. 1999) ("National policy codified in a statute of Congress such as Bankruptcy Code must be given primacy over local enactments and private contracts"). Moreover, property interests, which are created and defined by state law, may be altered by Congress under its power to establish uniform laws throughout the United States. *See Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

Section 524(e)'s abolition of the debtor's non-payment of a debt due to discharge as a defense by a derivatively liable defendant is in direct conflict with the New York State law of indemnity requiring payment of a judgment as a condition to the assertion of a derivative claim for indemnification. *See* Petition, App. 24a ("It is black letter law in New York that an indemnification claim does not arise until the party seeking indemnification has an out-of-pocket loss to be reimbursed"). In short, section 524(e) states that even though the debtor is relieved from paying a judgment, an action may be maintained against a derivatively liable defendant because the liability of any other entity is not affected. The payment rule states that no claim may be asserted against a derivatively liable defendant unless and until the judgment is paid. Accordingly, Indu Craft's discharge of its obligation to pay the bankruptcy judgment cannot stand as a bar to its assertion of a derivative claim against Baroda. The promulgation of section 524(e) represents Congress' alteration of state property rights by its clear intention of removing the debtor's inability to pay a debt as a bar to the debtor pursuing an indemnity claim against its indemnitor.

A determination by the Court that section 524(e) preempts the common law indemnity rule of many states, including New

York, requiring payment as a condition to the assertion of the claim will have widespread effect and importance. Debtors are often in the position where they may have to assert indemnity claims against third parties since such claims constitute property of the debtor's estate. A clear rule established by this Court that a debtor may prosecute its indemnity claims even though it has been discharged of its legal obligation for the debt will advance the twin goals of Bankruptcy, which are providing the debtor with a fresh start and maximizing the distribution of the debtor's property to its creditors. *Precision Indus. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 548 (2003). The contrary precedent established by the courts below should not stand because it improperly construed Bankruptcy Code as preventing the debtor from pursuing an indemnity claim as property of its estate for the benefit of its creditors.[9]

III. Since The District Court Held That The Act Of Confirmation Prevented Payment Of The Plan's Allowed Claims, Its Holding Necessarily Undermined The Feasibility Finding Of The Bankruptcy Court

The confirmation process in a Chapter 11 case is primarily an inquiry into the viability of the proposed plan and the disposition of the debtor's assets." *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. (In re Piper A.)*, 244 F.3d 1289, 1299 (11th Cir. 2001), *cert. denied*, 534 U.S. 827 (2001). Baroda's contention in its opposition brief that its motion did not represent a collateral attack on the Plan because Indu Craft stated in its Disclosure Statement that the Plan was feasible is pure sophistry. The statement of feasibility contained in the Disclosure Statement was predicated upon a Plan that had as its central component the payment of the allowed claims of Indu Craft's class 5 creditors through the prosecution of Indu Craft's derivative claim against Baroda. Indu Craft's creditors had the right to receive payment of their allowed claims from the net proceeds of the prosecution of Indu Craft's derivative claim against Baroda.

The District Court and Court of Appeals held in this case that it was the act of confirmation of Indu Craft's Plan that

9. Indu Craft's derivative claim against Baroda constituted approximately 90% of the value of all of its property.

caused Indu Craft to lose its derivative claim against Baroda. If the act of confirmation caused Indu Craft to lose its derivative claim, then the Plan was not feasible because the same act of confirmation made it impossible for Indu Craft's class 5 creditors to obtain payment of their allowed claims. There was no probability at all that the Plan provisions could be performed if confirmation was the *sine qua non* that prevented payment of the allowed claims and the loss of the derivative claim. It is ironic that the Plan could not have been confirmed without the affirmative vote of Indu Craft's class 5 creditors under 11 U.S.C. § 1126(f) (since all other classes of creditors received payment of their claims), and yet under the District Court's analysis it was their vote for confirmation of the Plan that made payment of their allowed claims impossible.

Thus, the District Court's holding that the derivative claim was lost through confirmation of the Plan destroyed the feasibility finding made by Bankruptcy Court and overturned Indu Craft's final and unappealable Plan. Baroda's motion, therefore, can only be viewed as a collateral attack on the Plan because the essence of the motion was its contention that as a result of the discharge of Trendi's claim resulting from confirmation of the Plan, the Plan provisions requiring payment of allowed claims from the proceeds of Indu Craft's derivative claim against Baroda could not be accomplished.

The successful collateral attack by Baroda on Indu Craft's plan violates *Celotex Corporation v. Edwards*, 514 U.S. 300 (1995) because Baroda has for all intents and purposes effectuated a reversal of the Plan outside of Bankruptcy rules and procedures for appellate review. *See also Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000). The District Court in this instance was not sitting as a bankruptcy appellate court and it was precluded from reversing the order of confirmation of Indu Craft's Plan by holding that confirmation of the Plan and the resultant discharge caused the loss of Indu Craft's derivative claim and prevented payment of the allowed claims.

CONCLUSION

For the foregoing reasons, Indu Craft's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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